NO. 80-1501

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IN THE

Supreme Court Of The United States

———— TERM, 1981

DOROTHY HOPE SULLIVAN, DAVID SULLIVAN AND WARREN SULLIVAN,
Petitioners,

VS.

FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN, LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES SULLIVAN RICE, MARY CHARLOTTE GIBSON, ESTATE OF H. D. TORIAN, HON. HENRY WILSON, AND HON. LEON HANNAFORD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD P. CONNELL
JACK F. DUNBAR
HOLCOMB, DUNBAR, CONNELL, MERKEL, TOLLISON & KHAYAT
A Professional Association
Post Office Box 368
Clarksdale, Mississippi 38614
(601) 627-2241

Counsel for Petitioners Dorothy Hope Sullivan David Sullivan and Warren Sullivan

QUESTION PRESENTED

May the District Court assume interpleader jurisdiction over the Complaint of the Executor Bank where the Bank holds no stake or property which is the subject of adverse claims, and the Bank is simply attempting to seek judgment to compensate it for estate taxes which the Arkansas Courts ordered the Bank to pay out of its own funds as the result of the Bank's mismanagement of the Estate?

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OPINIONS BELOW

On November 3, 1980, the United States Court of Appeals for the Sixth Circuit issued its decision, as yet unreported, affirming the District Court's interlocutory orders. (App. A 1) On December 5, 1980, the Court of Appeals issued its Order denying the Petition for Rehearing filed on behalf of Petitioners Sullivan, et al. (App. A 5)

The Hon. Judge Robert M. McRae, Jr., of the United States District Court for the Western District of Tennessee, Western Division, issued his bench opinion sustaining interpleader jurisdiction and granting a preliminary injunction on December 15, 1978. (App. B 73-77) On December 27, 1978, a written Order Granting Preliminary Injunction and Denying Motions to Dismiss was entered by the District Court. (App. B 82-84) On January 17, 1979, the District Court issued its written Findings of Fact and Conclusions of Law. (App. B 77-82) All of these decisions of the District Court are unreported.

Several decisions of the Courts of Arkansas and Mississippi are essential to the determination of the jurisdictional question presented by this Petition. The unreported decision of the Chancery Court of Desoto County, Mississippi, involving the Estate of Mrs. Torian was issued March 13, 1974. (App. B 16, 17) That decision was affirmed by the Mississippi Supreme Court in a reported opinion styled *Estate of Torian v. First National Bank of Memphis,* Miss. 321 So.2d 287 (1975). (App. B 18-30)

An unreported decision of the Probate Court of Crittenden County, Arkansas, in the matter of the Estate of Mrs. Torian was issued on November 24, 1976. (App. B 32-38) The reported decision of the Arkansas Supreme Court

affirming the Probate Court's order is styled *Estate of Lula S. Torian v. Louise Crum Smith, et al*, 263 Ark. 304, 564 SW 2d 521 (April 24, 1978). (App. B 39-51)

On October 2, 1978, the United States Supreme Court denied the Bank's Petition for Writ of Certiorari to review the judgment of the Arkansas Supreme Court. (App. B 52)

JURISDICTION OF THE SUPREME COURT

The Order of the Court of Appeals of which Petitioners seek review was entered on November 3, 1980. Petitioners filed a timely Petition for Rehearing in the Court of Appeals, which Petition was denied by Order of the Court of Appeals on December 5, 1980. (App. A-5)

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari by virtue of 28 U.S.C. §2101(c).

THE RELEVANT STATUTORY PROVISION

28 U.S.C. §1335 Interpleader:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

STATEMENT OF THE CASE

First Tennessee Bank (hereinafter the "Bank") is the Executor of the Estate of Lula S. Torian. Mrs. Torian died testate in 1972, domiciled in Arkansas, but owning some 920 acres of real property in Desoto County, Mississippi. Mrs. Torian had lived in Mississippi for many years and first married at age 79, in 1960. After her marriage, she resided in her husband's home in Arkansas, but Mrs. Torian continued to maintain her home in Mississippi.

Mrs. Torian's estate consisted of the Mississippi land, which was valued at $920,000 for tax purposes and bank accounts and stocks and bonds valued at approximately $486,000 at the time of her death. (App. B 40, 34) According to Mrs. Torian's Will, the land was devised to Dorothy Hope Sullivan, David Sullivan, Warren Sullivan, and Robert Lamb Sullivan (hereinafter "Mississippi beneficiaries"), all Mississippi residents, and Petitioners here with the exception of Robert Lamb Sullivan who was not served with process in this action. The residuary estate was devised to Louise Crum Smith, Ralph Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniel, Frances Sullivan Rice and Mary Charlotte Gibson, all Tennessee residents (hereinafter the "Arkansas beneficiaries," since they favored application of Arkansas law). (App. B 20, 29)The "Arkansas beneficiaries" are filing a separate Petition for Certiorari.

Mississippi law requires that in the absence of a contrary will provision, the personalty in an estate must bear the entire burden of the debts and expenses of the estate (including federal estate taxes) and the real property is liable for the tax only after the personal estate has been exhausted. (App. B 27, 28) Under Arkansas law, the estate

tax is apportioned equally among all estate beneficiaries. (App. B 42)

The Bank, as Executor, petitioned the Chancery Court of Desoto County, Mississippi, seeking to probate Mrs. Torian's Will in Mississippi. The Bank's petition was granted on November 3, 1972. Prior to the Bank's filing its petition in the Mississippi court, the Bank's attorney Mr. Spears advised the Bank against taking this course of action because of the conflicting laws of Arkansas and Mississippi. (App. B 48)

On May 9, 1973, the Bank petitioned the Arkansas Probate Court requesting postponement of the filing of an inventory because of the question of whether Arkansas or Mississippi was the proper forum for original jurisdiction to probate the will. (App. B 40-41)

On July 26, 1973, the Bank petitioned the Mississippi court seeking permission to withdraw the will from probate there and transfer it to Arkansas. (App. B 40)

The Mississippi beneficiaries objected to the Bank's petition to transfer the will to Arkansas and sought the application of Mississippi law which would allocate the payment of estate taxes to the residuary estate rather than the land. The Arkansas beneficiaries, whi all participated in the Mississippi suit, urged that the will be transferred to Arkansas. (App. B 20)

The Mississippi Chancellor found, as a fact, that Mrs. Torian had intended for her estate to be administered in accordance with Mississippi law. (App. B 23) The Mississippi Supreme Court affirmed the Chancellor's findings and held, in addition, that under the "interest analysis" approach to conflicts of law which is followed in Mississippi,

Mississippi had the greatest contacts with the Estate of Mrs. Torian. (App. B 23) This conclusion was based on the facts that there were no Arkansas citizens involved in the controversy, no real property located in Arkansas, and the personal property which Mrs. Torian owned at the time of her death was physically located in Tennessee. Mississippi, on the other hand, was the forum state, the home of the devisees of the real property, the situs of the land, and the law Mrs. Torian intended should apply. (App. B. 29) The Mississippi Supreme Court also held that once the Bank itself chose to probate the will in Mississippi, and it was not done by mistake, Mississippi law prohibited the withdrawal of the will. (App. B 24-25) The Mississippi Supreme Court affirmed the Chancellor's order that the estate taxes should be paid out of the residuary estate.

The Bank did not then seek interpleader relief before paying the taxes. Instead, the Bank paid the taxes and when it was required to file its inventory by the Arkansas Probate Court in April of 1976, it sought credit for the amount of total federal estate taxes paid, including the tax related to the Mississippi land. (App. B 34) The Bank did not seek authorization from the Arkansas probate court prior to paying the taxes, although nothing prevented it from doing so. Arkansas law provides that all payments made by the executor without order of the court are made at his own peril. (App. B 35)

In the Arkansas Probate Court, the Arkansas beneficiaries objected to the Bank's accounting, asserting that Arkansas law applied and therefore their share of the estate should not be liable for the taxes allocable to the Mississippi land (some $228,000). (App. B 43)

The Arkansas Probate Court ruled that the Mississippi

Supreme Court's judgment applying Mississippi law to allocate the tax burden was entitled to full faith and credit only insofar as it affected the real property in Mississippi. (App. B 47) Because the Bank, in its role as Executor of the Arkansas estate, was not subject to the jurisdiction of the Mississippi courts, their judgment was not entitled to full faith and credit insofar as it affected the assets of the Arkansas estate. (App. B 47) Applying its own conflicts rules, the Arkansas Supreme Court found that Arkansas apportionment law should govern the estate tax liability insofar as it affected the Arkansas estate assets. (App. B. 42)

The Bank petitioned the United States Supreme Court for a Writ of Certiorari to review the Arkansas Supreme Court's judgment, and its petition was denied on October 2, 1978. (App. B 52)

The necessary result of the Arkansas and Mississippi judgments was that the Bank, which had already paid the estate taxes in 1976 could not seek reimbursement from the Mississippi beneficiaries because of the final judgment of the Mississippi Supreme Court holding the Mississippi beneficiaries were not liable to pay the estate taxes. The Arkansas Supreme Court held that portion of the Mississippi judgment was entitled to full faith and credit. The Arkansas Supreme Court's judgment also held that the Bank could not obtain reimbursement from the Arkansas beneficiaries, but rather the Bank itself must bear the $228,000 tax liability. In so holding, the Arkansas Supreme Court commented at length on the Bank's mismanagement of the Torian Estate, also denying the Bank most of the fees and expenses which are statutorily authorized for the executor. (App. B 49-51)

The judgment of the Arkansas Supreme Court which made the Bank itself liable for the payment of the estate taxes was rendered on April 24, 1978, six years after Mrs. Torian's death. The Bank had never attempted to file an interpleader action during that six year period.

On November 17, 1978, the Bank filed this interpleader action in the United States District Court for the Western District of Tennessee. The Bank, claiming jurisdiction under 28 U.S.C. §1335, joined as defendants all the Arkansas beneficiaries and all the Mississippi beneficiaries (except for Robert Lamb Sullivan who was not served with process). The Bank sought an ex parte restraining order enjoining the Arkansas and Mississippi Courts from taking any action on the estate. (App. B 53) The District Court refused to issue the ex parte order. (App. B 59) The Mississippi and Arkansas beneficiaries both filed Motions to Dismiss the Bank's Complaint for lack of subject matter jurisdiction under 28 U.S.C. §1335, for the reason that the Bank had failed to demonstrate that it held any fund or property to which there were adverse claimants; and that none of the defendants had any claims whatsoever against the Bank, or against any estate assets. (App. B 60-64)

The District Court heard the testimony of the estate administration officer of the Bank who testified that the Bank had already paid the estate taxes on the land out of its own funds. He also testified that no claims were being asserted against the Bank by either the Mississippi beneficiaries or the Arkansas beneficiaries. (App. B 67-72)

The District Court then denied the defendant's Motions to Dismiss, holding that the Bank had satisfied the requirements of interpleader jurisdiction. (App. B 73-77) The District Judge also enjoined the Probate Court of Arkansas

and the Chancery Court of Mississippi from proceeding to close Mrs. Torian's Estate. (App. B 82-84) The District Court, pursuant to 28 U.S.C. §1292(b) made certification to the Court of Appeals to permit interlocutory appeal of its order denying the Motions to Dismiss. (App. A 2)

Both the Mississippi and the Arkansas beneficiaries appealed the District Court's decision to the Court of Appeals. On November 3, 1980, the Sixth Circuit issued a brief opinion affirming the interlocutory orders of the District Court. (App. A 2-3)

Petitioners here seek review of the Court of Appeals' ruling that interpleader jurisdiction is present. Should Petitioners prevail, the preliminary injunction granted by the District Judge would necessarily be dissolved.

IN THE

Supreme Court Of The United States

———— TERM, 1981

NO.

DOROTHY HOPE SULLIVAN, DAVID SULLIVAN, AND WARREN SULLIVAN; LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES SULLIVAN RICE, AND MARY CHARLOTTE GIBSON,
Petitioners,

VS.

FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN, ESTATE OF H. D. TORIAN, HON. HENRY WILSON, AND HON. LEON HANNAFORD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR GRANTING THE WRIT

By assuming statutory interpleader jurisdiction over this matter, the courts below have expanded interpleader

jurisdiction beyond the terms of the statute, beyond the decisions of this Court, and beyond the purpose of the interpleader statute.

The purpose of the interpleader statute is to protect a stakeholder from the "risk of loss resulting from the threatened prosecution of multiple claims." *Texas v. Florida*, 306 U.S. 398, 410, 59 S.Ct. 563, 83 L.Ed. 817 (1939).

The Bank may at one time have been a disinterested stakeholder in need of the relief of the interpleader statute. As the Executor of the Estate of Mrs. Torian, the Bank might have filed an interpleader action, deposited the estate assets into a federal district court, and the district court could have decided which group of beneficiaries should pay the estate taxes out of its share of estate assets. The Bank, like other interpleader plaintiffs, could have thereby avoided the burden of multiple litigation and the risk of inconsistent judgments.

Instead of seeking relief in a bill of interpleader, the Bank itself instituted the proceedings first in the Mississippi Chancery Court and then, in the Arkansas Probate Court. The Arkansas Supreme Court found as a fact that the Bank did so against the warning and advice of counsel. (App. B 48) The Bank was aware of the conflicting rules concerning payment of estate taxes in Arkansas and Mississippi, yet it made no attempt to seek interpleader relief.

The Bank itself instituted the actions which culminated in the final judgments of Mississippi and Arkansas. Now it seeks interpleader relief on the basis that those judgments are inconsistent and subject it to multiple liability on a single obligation.

The Bank, by itself instituting both the Mississippi and

the Arkansas proceedings, has differentiated itself from the plaintiffs in every other reported interpleader action.

Never before has a stakeholder sought judgments against each group of claimants in two different state courts and subsequently filed an interpleader action seeking relief from the final judgments it procured. No purpose of the interpleader statute is served by granting relief to such a party.

Even more important here is the fact that by obtaining final judgments in both Mississippi and Arkansas, the Bank has been required to pay the taxes out of its own funds, leaving the two groups of beneficiaries (defendants to this interpleader action) with no claim against the Bank whatsoever. Likewise, the Bank no longer holds any property or "stake" to which there are adverse claims. The Bank's interpleader action, filed at this late date, cannot possibly meet the statutory jurisdictional requirements for interpleader.

Yet the District Court and the Court of Appeals found interpleader jurisdiction was present, without ever answering the impossible question of how the jurisdictional requirements could be met when the Plaintiff no longer held any stake or property as to which there were adverse claims.

Judge McRae, of the District Court, in his bench opinion held:

> I regret that the bank didn't at some point much earlier say 'Here are all the assets, I will pay them into some appropriate interpleader court or bond.' And let the bank by agreement continue to administer the assets, or protect them so they earn

> money. But that wasn't done. * * * I am going to hold that the bank did not wait too late, and that this is an appropriate means of putting together the adverse claims of who should bear the brunt of these taxes. * * * I do believe that the Supreme Court of the United States in its rulings has indicated that interpleader is an appropriate vehicle where you have inconsistent judgments from the states. (App. B 73-74) The thing that has persuaded me to go this route is that I have become persuaded that some court has to be available to resolve this matter. (App. B 75)

Petitioners respectfully submit that the error in Judge McRae's ruling is that he fails to recognize that while *Treinies v. Sunshine Mining Co.,* (308 U.S. 66 (1939)) held that the existence of inconsistent state court judgments does not preclude the bringing of an interpleader action, the mere existence of inconsistent state court judgments is no substitute for fulfillment of the jurisdictional requirements of the interpleader act.

In the interpleader cases which have involved inconsistent state court judgments, the interpleader plaintiff has demonstrated that he still held some stake or property to which the defendants were asserting adverse claims.[1]

[1]In **Treinies v. Sunshine Mining Co.,** 308 U.S. 66 (1939) where there were judgments of the Idaho and Washington State Courts ordering the interpleader plaintiff, Sunshine Mining Co., to recognize the ownership rights of the various claimants to the stock, the Mining Company still held the stock and deposited it into the registry of the Court at the inception of its interpleader action. 308 U.S. at 72.

In **Merrill, Lynch, Pierce, Fenner & Smith v. Cavicchia,** 311 F. Supp. 149 (S.D. N.Y. 1970) the interpleader plaintiff had been directed by New York courts and New Jersey Courts to convey certain securities to different parties. Before complying with either court's order, the plaintiff filed its interpleader.

Moreover, Judge McRae candidly admitted that he was persuaded to assume jurisdiction because "some court has to be available to resolve this matter."

The failing of this rationale is pointed out by the Tenth Circuit in *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 56-58 (10th Cir. 1977):

> . . . we must decide the case within the framework of the interpleader statute in view of the obvious limiting principle that federal courts are courts which are dependent upon Congress for the exercise of subject matter jurisdiction. The only jurisdictional offering is the interpleader statute and our decision must be made in terms of its *specific criteria*. It is not . . . for us to redesign the interpleader statute in order for it to accommodate this unusual lawsuit. As was said by the Supreme Court in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 18 L.Ed 279, 87 S.Ct. 1199 (1976), the interpleader procedure is not a bill of peace capable of furnishing a tribunal in every multiparty lawsuit. It is of limited breadth and scope and does not fit the case at bar. (Emphasis added)

The Court of Appeals affirmed Judge McRae's finding of interpleader jurisdiction without explaining how the specific jurisdictional criteria of the statute had been met. (App. A 2-4)

Assuming, without conceding, that the judgments of Arkansas and Mississippi are in conflict, a federal court may not assert interpleader jurisdiction merely because it appears to be a practical solution to the Bank's self-inflicted dilemma. The interpleader statute does not authorize juris-

diction, and the district court should not be permitted to assume it.

When It Filed This Interpleader Action, The Bank Held No Property To Which There Were Adverse Claimants.

The Bank's Complaint filed at the inception of this Interpleader action fails to allege that the Plaintiff Bank holds any property, fund, or stake which is subject to adverse claims by the defendants. (App. B 7) In its prayer for relief, the Bank's Complaint does not ask the Court to determine the proper disposition of any interpleaded property. Rather, the Bank seeks to recover a money judgment from the defendants. (App. B 13) The District Court found that following the decision of the Mississippi Supreme Court, the Bank paid the estate taxes with assets of the residuary estate (the Arkansas estate). (App. B 79) The Bank, in its accounting to the Arkansas Probate Court, sought credit for the entire amount of estate taxes paid. The Arkansas Court held that the amount of estate taxes attributable to the Mississippi land (some $228,000, App. B 43) could not be charged to the residuary estate. The Arkansas judgment thus required the Bank to use its own funds to reimburse the residuary estate for the estate taxes paid.

At the hearing in the District Court held in connection with defendants' Motions to Dismiss for lack of jurisdiction, the representative of the Bank testified that in complying with the Order of the Arkansas Courts, the Bank had paid $229,114.34 of its own funds to the Arkansas beneficiaries plus interest of $27,795.02. (App. B 67)

The only assets remaining in the Arkansas estate were the amounts reserved pursuant to the Arkansas Probate

Court's order for some additional Arkansas state taxes, attorney's fees and similar items. (App. B 70) All assets of the Arkansas estate had been distributed or earmarked for specific obligations. There are no assets in the hands of the Bank to which the Arkansas beneficiaries have any claim, or could have any claim.

Similarly, at the time the Bank filed its interpleader in District Court, there were no assets in the Mississippi estate account. The Bank held no property to which the Mississippi beneficiaries had any claim or could have any claim.

Under Mississippi law, title to the real property of a decedent never vests in the executor (as title to personalty does) but instead goes directly to the devisees or heirs. *Gidden v. Gidden*, 176 Miss. 98, 167 So. 785 (1936); Miss. Code Ann. 1972 §91-7-91 (Amended, 1976) (App. B 85). If the personalty has been exhausted by the payment of debts and taxes, the executor must petition the chancery court for an order authorizing the sale of the lands to satisfy the outstanding debts of the estate. Miss Code Ann. 1972 §91-7-191 (App. B 85)

Pursuant to the statutory scheme of Mississippi, title to Mrs. Torian's Mississippi land vested in the Mississippi beneficiaries upon her death, in 1972, and the Mississippi beneficiaries have been farming the land ever since.

Obviously, the Bank as executor of Mrs. Torian's estate holds no property to which the Mississippi beneficiaries have any claim, and under the Mississippi law, the Bank as executor never had control or possession of any property to which the Mississippi beneficiaries had any claim.

In an attempt to avoid the inescapable conclusion that

the Bank no longer holds any property to which there are adverse claims, the Bank took the position that because the Arkansas and Mississippi estates have not been finally closed, the distributions are of an "interim" nature. The Bank claimed that the laws of Arkansas and Mississippi allow adjustments of an executor's accounts at any time prior to final accounting.

This argument fails to establish that the Bank holds any property to which there are conflicting claims. The Mississippi beneficiaries already own the Mississippi real property and there is no lien for taxes against it. The Bank has already distributed the Arkansas personalty to the Arkansas beneficiaries without charging against it the federal estate taxes related to the Mississippi land. The Bank has paid the taxes with its own funds. Therefore, it is certain that neither the Arkansas nor Mississippi beneficiaries will ever make any claim against the Bank for anything. Each has already received all the property to which they have claimed entitlement.

The Bank claimed that it fulfills the stakeholder requirement of the interpleader statute because in its final accounting prior to closing the estates, it can still charge either the Arkansas or Mississippi beneficiaries for the taxes which it paid out of its own funds.

The Bank's position reveals that the nature of this suit is not an interpleader. The Bank is seeking to recover a sum of money from either of the defendants. Interpleader requires exactly the opposite: that the plaintiff have some control over property which the defendants seek to recover. The conclusion of *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 57 (10th Cir. 1977) is equally applicable here:

> The structure of this action considered as a whole is such that it fails completely to qualify as an interpleader procedure. The property is not in the hands of the plaintiff and thus it cannot be placed by plaintiff in the custody of the court. The essential aspect is that the res be under the control of the person bringing the lawsuit. . . . There being no property subject to the demands of the claimants, the main purpose of the interpleader action cannot be brought about.

Furthermore, the Bank's assertion that the distributions are merely "interim in nature" is based upon a fiction unsupported by the law of Arkansas and Mississippi.

The Bank itself asserted that:

> . . . the Arkansas and Mississippi decisions as to how [the federal estate] taxes shall be paid necessarily prevent the Bank from requiring anyone to pay them. (Brief of Plaintiff/Appellee, First Tennessee Bank, in 6th Circuit Court of Appeals, p. 14.)

The Bank has admitted that the Arkansas and Mississippi decisions prevent the Bank from requiring either the Arkansas or Mississippi beneficiaries to pay the taxes, yet it attempts to base interpleader jurisdiction on the theory that under the laws of Arkansas and Mississippi the Bank may still attempt to require the Arkansas or Mississippi beneficiaries to pay the taxes.

The Court of Appeals agreed with the District Court's finding of fact that the assets of the estate which were in the hands of the Bank have been completely depleted:

> Conflicting rulings . . . by the courts of Arkansas and Mississippi have resulted in the executor's being required to pay a portion of the federal estate tax applicable to the Mississippi real estate from its own funds rather than from the decedent's estate. (App. A 3)

Neither the District Court nor the Court of Appeals found that there was any stake in the hands of the Plaintiff Bank.

The testimony of the Bank's estate administration manager, Mr. Blumenthal, admitted that there are no claims being asserted against the Bank by either the Mississippi or the Arkansas beneficiaries. (App. B 70, 72)

This is simply an action by the Bank to recover money from the defendants. It is not in the nature of interpleader and none of the jurisdictional requirements of the interpleader statute are present.

CONCLUSION

Petitioners urge the Court to issue a writ of certiorari to review and reverse the judgment of the Court of Appeals. This action is not in the nature of interpleader and the statutory requirements of interpleader cannot be met, nor can its purposes be furthered by the District Court's assumption of jurisdiction.

Respectfully submitted,

EDWARD P. CONNELL
JACK F. DUNBAR
HOLCOMB, DUNBAR, CONNELL,
MERKEL, TOLLISON & KHAYAT
A Professional Association
Post Office Box 368
Clarksdale, Mississippi 38614
(601) 627-2241

Counsel for Petitioners
Dorothy Hope Sullivan
David Sullivan and
Warren Sullivan

Appendix

APPENDIX "A"

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

November 3, 1980

Mr. John Porter
Mr. Elton Rieves
Mr. Ben Adams
Mr. David Lial

Re: Case Nos. 79-1141/42, First National Bank N.A. Memphis, executor of the estate of Lula Torian, vs. Louise Crum, et al
District Court No. C-78-2610

Dear Counsel:

Enclosed is a copy of this Court's decision which was entered today in the above-styled cases.

Yours very truly,

John P. Hehman, Clerk

By: /s/ Audrey Crockett
(Ms.) Audrey Crockett
Deputy Clerk

Enclosure

NO. 79-1141
NO. 79-1142

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRST NATIONAL BANK N.A. MEMPHIS,
Executor of the Estate of Lula S. Torian

Plaintiff-Appellee

vs.

LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES SULLIVAN RICE, through her co-guardians F. BATES SULLIVAN and VIRGINIA SULLIVAN McDANIELS and CHARLOTTE GIBSON (79-1141)

DOROTHY HOPE SULLIVAN, WARREN SULLIVAN and DAVID SULLIVAN (79-1142)

Defendants-Appellants

BEFORE: LIVELY and JONES, Circuit Judges; and GORDON,* Senior District Judge.

ORDER

This matter is before the court on appeal from two interlocutory decisions of the district court. The district court denied motions of the defendants to dismiss this action under the Interpleader Act, 28 U.S.C. §1335, and made the certification required by 28 U.S.C. §1292(b) for an immediate appeal. In the same order the district court granted to

*The Honorable James F. Gordon, Senior Judge, United States District Court for the Western District of Kentucky sitting by designation.

the plaintiff a preliminary injunction which is appealable as a matter of right pursuant to 28 U.S.C. §1292(a)(1).

The case arose out of conflicting requirements of Arkansas and Mississippi with respect to the source from which federal estate taxes should be paid on real estate owned by a decedent. The plaintiff-appellee is the executor of the will of a decedent who died a resident of Arkansas and the owner of real estate in Mississippi. Conflicting rulings by the courts of Arkansas and Mississippi have resulted in the executor's being required to pay a portion of the federal estate tax applicable to the Mississippi real estate from its own funds rather than from the decedent's estate.

On appeal the appellants contends that the court had no jurisdiction under the Federal Interpleader Act because two of the requirements of the Act were not present: that the plaintiff was not holding a "stake" and that there were not adverse claimants to such a stake. They contend that the findings of the district court to the contrary are clearly erroneous and that they were entitled to have their motion to dismiss granted and process quashed for lack of jurisdiction. The appellants also contend that the district court abused its discretion in granting a preliminary injunction.

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel, the court concludes that the findings of the district court are not clearly erroneous and that prejudicial error of law was not committed in denying the motion to dismiss. The court also concludes that the district court did not abuse its discretion in entering a preliminary injunction. This order relates only to matters raised by this interlocutory appeal.

The judgment of the district court is affirmed and the cause remanded for further proceedings.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

FILED: November 3, 1980.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

December 5, 1980

Mr. John S. Porter
Mr. Elton Rieves
Mr. Ben Adams
Mr. John Speer
Mr. David Lial
Mr. Edward Connell

Re: Case Nos. 79-1141/42, First National Bank N.A. Memphis, executor of the estate of Lula S. Torian, vs. Louise Smith, Ralph Crum, James Crum, F. Bates Sullivan, C. H. Sullivan, Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Sullivan Rice through her co-guardians F. Bates Sullivan and Virginia Sullivan McDaniels and Charlotte Gibson, District Court No. C-78-2610

Dear Counsel:

Enclosed is a copy of an order entered today in the above-styled cases.

Yours very truly,

John P. Hehman, Clerk

By: /s/ Audrey Crockett
(Ms.) Audrey Crockett
Deputy Clerk

Enclosure

UNITED STATES COURT OF APPEALS

NO. 79-1141
NO. 79-1142

FOR THE SIXTH CIRCUIT

FIRST NATIONAL BANK N.A. MEMPHIS,
Executor of the Estate of Lula S. Torian

Plaintiff-Appellee

vs.

LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCIS SULLIVAN RICE, through her co-guardians F. BATES SULLIVAN and VIRGINIA SULLIVAN McDANIELS and CHARLOTTE GIBSON (79-1141)

DOROTHY HOPE SULLIVAN, WARREN SULLIVAN and DAVID SULLIVAN (79-1142)

Defendants-Appellants

BEFORE: LIVELY and JONES, Circuit Judges; and GORDON,* Senior District Judge.

ORDER

Upon receipt and consideration of the petition for rehearing filed herein by appellants Sullivan the court concludes that the matters raised therein were fully considered upon the original submission of this appeal and that rehearing is not required. The court also concludes that clarification of its order is not required.

*The Honorable James F. Gordon, Senior Judge, United States District Court for the Western District of Kentucky, sitting by designation.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

FILED: December 5, 1980.

MISSISSIPPI CODE 1972

§91-7-191. *Sale of land upon insufficiency of personalty.*

When an executor or administrator shall discover that the personal property will not be sufficient to pay the debts and expenses, he may file a petition in the chancery court for the sale of the land of the deceased, or so much of it as may be necessary, and exhibit to the court a true account of the personal estate and debts due from the deceased, and the expenses and a description of the land to be sold.

MISSISSIPPI CODE 1972

§91-7-91 *Assets defined; unsecured creditors to give notice.*

The goods, chattels, personal estate, choses in action and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets and shall stand chargeable with all the debts, funeral expenses of the deceased, and the expenses of settling the estate. The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed. Provided, however, that in cases where no ad-

ministration has been or shall be commenced on the estate of the decedent within three (3) years after his death, no creditor of the decedent shall be entitled to a lien or any claim whatsoever on any real property of the decedent, or the proceeds therefrom, against purchasers or encumbrancers for value of the heirs of the decedent unless such creditor shall, within three (3) years and ninety (90) days from the date of the death of the decedent, file on the lis pendens docket in the office of the clerk of the chancery court of the county in which said land is located notice of his claim, containing the name of the decedent, a brief statement of the nature, amount and maturity date of his claim and a description of the real property sought to be charged therewith. The provisions of this section requiring the filing of notice shall not apply to any secured creditor having a recorded lien on said property. (Supp. 1976)

APPENDIX "B"

DOCKET ENTRIES

Date 1978	Proceedings
11-17-78	Bond for Costs — $250.00.
11-17-78	Complaint.
11-17-78	Ex Parte Motion for Temporary Restraining Order and Memorandum.
11-17-78	Attorney's Certificate In Support of Ex Parte Motion for Temporary Restraining Order.
11-17-78	Issued Summons and Handed Atty.
11-17-78	10:10 — B. Adams & J. Speer — Court did not Grant Interpleader, but Att. To Return with Briefs.
11-17-78	Notice of Hearing on Application for Preliminary Injunction — Set Fri. 12/15/78 at 10:30 a.m. — CHJ, Atty. for Pltfs. & Copy to be served with Orig. Complaint.
11-20-78	Issued summons for all parties with attached notice of hearing on app. for preliminary inj.
11-28-78	MR on Summons, for C. H. Sullivan, Jr. — Execd 11-21-78.
11-28-78	MR on Summons, for Louise Crum Smith — Execd 11-21-78.
11-28-78	MR on Summons, for Ralph Crum — Execd 11-21-78.
11-28-78	MR on Summons, for Virginia Sullivan McDaniels — Execd 11-21-78.

11-28-78 MR on Summons, for Louise Sullivan Jennings — Execd 11-21-78.

11-28-78 MR on Summons, for Mary Charlotte Gibson — Execd 11-21-78

11-28-78 MR on Summons, for James Crum — Execd 11-21-78.

11-28-78 MR on Summons, for Frances Sullivan Rice — Execd 11-21-78.

11-28-78 MR on Summons, for Bates Sullivan — Execd 11-21-78.

11-28-78 MR on Summons, for Estate of H. D. Torian — Execd 11-21-78.

11-28-78 4:00 p.m. — J. Speer

Court denied J. Speer's application for Tro & Will prepare Order. Chambers conference will still be held on Wed. 12/13/78 & application for preliminary injunction on Fri. 12/15/78.

11-28-78 Motion to Reconsider Denial of Temporary Restraining Order and Memorandum in Support thereof.

11-29-78 Order on Motion to Reconsider Denial of Temporary Restraining Order — Denied — preliminary injunction and pre-hearing conference shall remain set as previously scheduled — CHJ, Adams & Speer.

12- 6-78 MR on Summons, for Robert Lamb Sullivan — Unexecd 11-30-78.

12- 6-78 MR on Summons, for Warren Ware Sullivan — Execd 11-30-78.

12- 6-78 MR on Summons, for David Sullivan — Execd 11-30-78.

12-11-78 Motion of Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, VA. Sullivan McDaniel, Virginia Sullivan McDaniel, as Co Guard of Frances Sullivan Rice, and Mary Charlotte Gibson to quash summons and dismiss complaint.

12-11-78 Memorandum of authorities on behalf of Louise Crum Smith, et al.

12-13-78 Motion of D. H. Sullivan, David Sullivan and Warren Sullivan to dismiss or in the alt. for summary judgment.

12-13-78 Brief in support of above motion.

12-13-78 MR on Summons for, Dorothy Hope Sullivan — Execd 12-5-78.

12-14-78 Memorandum of this Court's jurisdiction under the Federal Interpleader Act.

12-14-78 Interpleader bond — in amount of $260,000.00.

12-15-78 Copy of Appellants' Statement of the Case pursuant to Rule 7(f) filed in the Supreme Court of Mississippi.

12-15-78 Assignment of errors filed in Supreme Court of Miss. (Copy).

12-15-78 Copy of Appeal Bond in Chancery Court of DeSoto Co., Miss.

12-15-78 Copy of Answer to Petition for Permission to Withdraw Original Will filed in Chancery Court DeSoto County, Miss.

12-15-78 Copy of Petition of Executor for Permission to Withdraw Original Will filed in Chancery Court of DeSoto County, Miss.

12-15-78 Copy of Order Discharging Fidelity & Deposit Co. of Maryland under Supersedeas Bond filed in Probate Court of Crittenden Co., Ark.

12-15-78 Copy of Order Denying Continuance and Directing Distribution filed in Probate Court of Crittenden Co., Ark.

12-15-78 10:30 — Evidentiary Hearing
B. Adams—J. Speer—J. Porter, Rieves, Bates Sullivan, J. Dunbar & Edw. Connell Witnesses — J. Blumenthal — Court holds that the bank did not wait too late and an interpleader is appropriate means of bringing together the adverse claims as to whom should bear payment of these taxes — To issue prel. injunct. against Judges named in this suit and enjoin parties from taking steps to close the estates. Does not order anyone to pay any money — This prel. inj. can be appealed, etc. J. Speer to submit findings to Court — Court overruled motions of the two sets of defendants.

12-28-78 Order Granting Preliminary Injunction and Denying Motion To Dismiss. Court is of the opinion that this order involves a controlling question of

law as to which there is a substantial ground for difference of opinion, namely jurisdiction of this Court to proceed under the interpleader statute in light of facts and circumstances of this case — an immediate appeal from this order may materially advance the ultimate termination of the litigation. CHJ, Porter, Adams, Speer, Rieves, Dumbar & Lail.

1979

1- 3-79 MR on Summons, for Hon. Henry Wilson — Execd 12-20-78.

1-10-79 MR on Alias Summons, for Hon. Leon J. Hannaford — Execd 1-4-79.

1-17-79 Findings of Fact and Conclusions of Law On Application for Preliminary Injunction — defts. Smith and Sullivan enjoined from instituting or prosecuting any suit, including probate proceedings regarding the Estate of Lula S. Torian, deceased — court at hearing was only concerned with that portion of motions filed by defendants which raise jurisdictional question, and Court is of opinion that other grounds of motions filed should not be ruled upon at this time (all of which was incorporated in Court's order filed 12/27/78) — CHJ, Ginny, Speer, Porter, Rieves & Dunbar (letter to all attorneys written by Judge McRae mailed with copy of this order).

1-22-79 Notice of Appeal — by defts. from order granting preliminary injunction and motions to dismiss — CHJ, Hehman, Adams, Dunbar, Rieves and Porter.

1-22-79 Appeal Bond.

1-24-79 Notice of Appeal — by defts. Dorothy H. Sullivan, Warren Sullivan and David Sullivan —CHJ, Hehman, Adams, Porter, Rieves and Lail.

1-24-79 Appeal Bond.

1-16-79 Reporter's Transcript of Testimony of Robert P. Blumenthal (Clerk's copy only).

1-16-79 Reporter's Transcript of Ruling of the Court 12/15/78 — (Clerk's copy only).

1-26-79 Reporter's Transcript of Testimony of Robert P. Blumenthal — (1 Vol. Original).

1-26-79 Reporter's Transcript of Ruling of the Court 12/15/78 — (1 Vol. Original).

COMPLAINT
(Filed November 17, 1978)

Comes now the Plaintiff, First Tennessee Bank N.A. Memphis, and for its suit states as follows:

PARTIES

1. Plaintiff, First Tennessee Bank N.A. Memphis (hereinafter referred to as "First Tennessee"), formerly First National Bank of Memphis, is a national bank organized and existing under the laws of the United States with its principal place of business in Memphis, Tennessee.

2. Defendants, Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Sullivan Rice and Mary Charlotte Gibson, are and at all times mentioned herein were individuals residing in the State of Tennessee, except Defendant, Louise Crum Smith, who is and at all times mentioned herein was an individual residing in the State of Mississippi. Defendant, Estate of H. D. Torian, is an Arkansas estate pending in the Crittenden County, Arkansas Probate Court. Hereinafter all defendants referred to in this paragraph shall be referred to as "defendants Smith, et al."

3. Defendants, Dorothy Hope Sullivan, Robert Lamb Sullivan, David Sullivan, and Warren Sullivan, hereinafter referred to as "defendants Sullivan, et al.," are and at all times mentioned herein were individuals residing in the State of Mississippi.

4. Defendant, Hon. Henry Wilson, is the Probate Judge of Crittenden County, Arkansas, and in whose court the Arkansas Probate proceeding is presently pending. Defendant, Hon. Leon Hannaford is the Chancellor of the

Chancery Court of DeSoto County, Mississippi, and in whose court the Mississippi Probate proceeding is presently pending.

JURISDICTION

5. This action in the nature of a Bill of Interpleader is brought under the provisions of the Federal Interpleader Act, Title 28, United States Code, Sections 1335, 1397, and 2361, to compel the Defendants mentioned herein (except defendants Wilson and Hannaford) to interplead their claims in compliance with the provisions of the aforementioned Act as is hereinafter more fully set forth.

6. Jurisdiction is conferred on this Court by Title 28, United States Code, Section 1331 and Section 1335. Two or more of the adverse claimants in this action are of diverse citizenship, and the amount in controversy exceeds $500.00, as more fully appears hereafter.

CAUSE OF ACTION

7. Plaintiff, First Tennessee, is and at all times mentioned herein, was executor of the Estate of Lula S. Torian in the States of Mississippi and Arkansas. Mrs. Torian died testate, legally domiciled in West Memphis, Arkansas but owning approximately 920 acres of real property in DeSoto County, Mississippi.

8. Under the terms of Mrs. Torian's will, which was probated in both the States of Mississippi and Arkansas, the Mississippi real estate was devised to defendants Sullivan, et al., the residents of the State of Mississippi. The residuary estate under Mrs. Torian's will, consisting of personal property, was left to defendants Smith, et al., residents of the State of Tennessee, except for Defendant Louise Crum

Smith, who is and was a resident of DeSoto County, Mississippi, and H. D. Torian, Mrs. Torian's husband who was alive at the time of her death and a resident of Arkansas. Mr. Torian's interest was not affected in any way by the litigation in either Mississippi or Arkansas.

9. After appointment of Plaintiff as executor in both Mississippi and Arkansas, a proceeding was held in the Mississippi Chancery Court, the Court of Probate in the State of Mississippi, to determine whether the allocation of the burden of death taxes among the beneficiaries would be based upon the law of Arkansas or upon the law of Mississippi.

10. The defendants Sullivan, et al., sought application of Mississippi law in the proceeding, and the defendants Smith, et al., contended application of Arkansas law was appropriate.

11. After a full evidentiary hearing in the Mississippi Court, in which all defendants Smith and Sullivan participated and appeared, the Mississippi Court ruled that the allocation of the tax burden among beneficiaries should be governed by the law of the State of Mississippi which provides that the residuary estate is liable for all estate and inheritance taxes. A copy of said Judgment and Opinion is attached hereto as Exhibit "A".

12. An appeal was taken from said ruling by defendants Smith, et al., seeking to review the determination of the Mississippi Chancery Court as to what state law should be applied. The Mississippi Supreme Court affirmed the lower Mississippi Court's determination and ruled that the law of the State of Mississippi should apply. A copy of said Judgment and Opinion is attached hereto as Exhibit "B" and made a part of this Complaint.

13. Payment of all death taxes due in connection with the administration of the estate was made by Plaintiff in accordance with the decree of the Mississippi Supreme Court. Thus, the total amount of death taxes were paid from the residuary estate of the deceased. Payment of the amount of the death taxes pursuant to the Mississippi decree was agreed to by the parties including defendants Smith, et al., (residuary legatees) whose counsel negotiated certain property valuations with the Internal Revenue Service in order that payment could be made promptly.

14. Subsequent to the decision of the Mississippi Supreme Court and the payment of taxes in accordance therewith, Plaintiff filed an accounting with the Arkansas Probate Court which reflected payment of death taxes from the residuary assets of the estate. The defendants Smith, et al., (residuary legatees) objected to the accounting and requested that the Arkansas Court order First Tennessee to (1) reimburse the residuary estate $228,543.22 for death taxes charged thereto pursuant to the Mississippi decree, and (2) apply Arkansas law to the allocation of the burden of payment of death taxes.

15. Plaintiff asserted the prior decree of the Mississippi Supreme Court in the Arkansas proceedings, specifically relying upon the Full Faith and Credit clause and the doctrine of res judicata. After a hearing before the Probate Court of Crittenden County, Arkansas, the Court ruled in favor of the defendants Smith, et al., refused to recognize the Mississippi decree, and denied Plaintiff the tax credits reflected in its accounting totalling $229,114.34 in effect requiring that sum be paid to the residuary estate. Since there are not sufficient estate assets to reimburse the residuary estate and its beneficiaries, defendants Smith,

et al., the plaintiff, which is not at fault, would therefore be required to use its own assets to comply with the Court's order. A copy of said Order and Opinion in the Arkansas Probate Court is attached hereto as Exhibit "C".

16. Plaintiff timely appealed the decision to the Arkansas Supreme Court. The Arkansas Supreme Court considered the constitutional issue raised, but affirmed the determination of the Arkansas Probate Court. A copy of the Opinion of the Arkansas Supreme Court is attached hereto as Exhibit "D".

17. From the final determination of the Arkansas Supreme Court, Plaintiff petitioned the United States Supreme Court for a writ of certiorari to review the denial of a federal right contained in Article IV, Section 1 of the Constitution of the United States and the United States Code, Title 28, Section 1738, the codification of the full faith and credit clause.

18. On October 2, 1978, the Supreme Court of the United States denied the Plaintiff's petition for a writ of certiorari. A copy of said denial is attached hereto as Exhibit "E" and made a part of this Complaint. Subsequently, plaintiff petitioned for a reconsideration of the denial of certiorari, said petition being denied on November 13, 1978.

19. Plaintiff, as executor of the Estate of Lula S. Torian, is faced with conflicting judgment of the highest courts of the States of Arkansas and Mississippi. Defendants Smith, et al., claim as a right the relief as set forth in the decree of the Arkansas Probate Court and Arkansas Supreme Court, and particularly that portion requiring Plaintiff to reimburse in excess of $230,000.00 to the residuary estate in which those defendants have an interest.

Defendants Sullivan, et al., claim as a matter of right the mandate of the Mississippi Supreme Court and Chancery Court determining that the law of the State of Mississippi should apply, which is financially rewarding to those defendants. Plaintiff, as executor, has a fiduciary obligation to all Defendants and is obligated to obey the orders of both courts. However, it is impossible for Plaintiff to comply with the orders of both courts because each judgment is exclusive in its application.

20. As a result of the conflicting claims of all of the Defendants, both Smith, et al. and Sullivan, et al., and their relying upon the inconsistent state court judgments, plaintiff cannot safely determine as between them, without great hazard to itself, which of the decrees it should obey and operate under.

21. Unless all of the Defendants here are restrained and enjoined from prosecuting suits against Plaintiff or from proceeding further in those proceedings presently pending with respect to the issues involved and from making any effort to satisfy the judgments rendered previously by the Courts of the States of Mississippi and Arkansas, Plaintiff will be subjected to multiple claims, inconsistent judgments, and will be prejudiced and subjected to additional litigation.

22. Plaintiff has heretofore deposited with the Probate Court of Crittenden County, Arkansas, a properly secured bond in an amount sufficient to satisfy Plaintiff's obligation under that Court's judgment.

23. Defendants Smith, et al. are claiming the benefit of the Arkansas judgment, and the defendants Sullivan, et al. are claiming the benefit of the Mississippi judgment. As a result, Plaintiff cannot properly close either of the

Probate proceedings until a final determination is made that will resolve the inconsistent determinations of the Arkansas and Mississippi Courts. Further, absent a determination by this Court of which judgment is correct and therefore controlling, Plaintiff is subject to suit by each of the two groups of defendants for not recognizing one judgment exclusively over the other.

24. Plaintiff has at all times herein properly exercised its powers as executor and has further faithfully performed its fiduciary duties as executor.

WHEREFORE, PLAINTIFF RESPECTFULLY PRAYS THAT:

1. Proper process issue and that this Complaint be allowed in the nature of a Bill of Interpleader.

2. The Court enter an order requiring the beneficiaries under the Will of Lula S. Torian, all of whom are Defendants herein, to interplead in this action regarding their rights, represented and effected by the two inconsistent State Court judgments.

3. Plaintiff be relieved from any and all further liability to Defendant beneficiaries upon the determination of which of the conflicting State Court judgments should be controlling upon it and the parties hereto and further be awarded such judgment as may be appropriate under the determination made by this Court.

4. This Court restrain and enjoin the individual defendants, the Hon. Leon Hannaford, Chancellor of the Chancery Court of DeSoto County, Mississippi and the Hon. Henry Wilson, Judge of the Probate Court of Crittenden County, Arkansas, and those acting in concert with them from commencing any action in any court against Plaintiff,

as executor, from taking any further action in those proceedings now pending with respect to the Estate of Lula S. Torian, from undertaking to satisfy either the Mississippi or Arkansas judgment, or from proceeding in any manner to subject plaintiff, to any legal process of proceeding concerning the Estate of Lula S. Torian.

5. Plaintiff be granted such other and further relief as the Court may deem proper.

/s/ Ben C. Adams
Attorney for Plaintiff

/s/ John C. Speer
Attorney for Plaintiff

OF COUNSEL:
HEISKELL, DONELSON, ADAMS,
WILLIAMS & KIRSCH
2020 First Tennessee Building
Memphis, Tennessee 38103
(901) 525-8231

STATE OF TENNESSEE
COUNTY OF SHELBY

Before me, the undersigned Notary Public, personally appeared R. P. Blumenthal, who being first duly sworn according to law, stated that he is Estate Administration Manager of FIRST TENNESSEE BANK N.A. MEMPHIS, formerly known as The First National Bank of Memphis, that in such capacity he is authorized to make oath to the foregoing Complaint; that he has read the foregoing Complaint; and that the contents thereof are true to the best of his knowledge, information and belief.

/s/ R. P. Blumenthal

EXHIBIT "A"

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

FIRST NATIONAL BANK OF MEMPHIS,
Executor

Of NO. 72-497

ESTATE OF LULA S. TORIAN, DECEASED

FINAL DECREE

THIS CAUSE having been submitted to the Court on pleadings, oral and documentary evidence, and briefs of counsel, and the Court having concluded (for the reasons set forth in its Memorandum Opinion dated March 13, 1974) that the Executor's Petition for Permission to Withdraw the Original Will of Lula S. Torian, Deceased, should be denied and that the cross-petitioners (Dorothy Hope Sullivan, Robert Lamb Sullivan, Warren Ware Sullivan, Mrs. Mary Sullivan and David Sullivan) are entitled to have the decedent's will construed as hereinafter set forth.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED:

1) That the aforesaid Petition be and the same is hereby denied and dismissed without relief and with prejudice;

2) That the decedent's will be and the same is hereby construed so as to require the payment from the residuary estate of all estate taxes, all other liabilities of the estate and all administration expense; and that the Executor be and it is hereby authorized and directed to proceed accordingly in the administration and distribution of said estate.

ORDERED, ADJUDGED AND DECREED this the 26th day of March, 1974.

/s/ Herbert Fant, Chancellor

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

FIRST NATIONAL BANK OF MEMPHIS,
Executor

Of NO. 72-497

ESTATE OF LULA S. TORIAN, DECEASED

MEMORANDUM OPINION

The court has reached the following conclusions:

1. In view of the express provision of Section 91-7-33 of the Mississippi Code of 1972 the original will was properly admitted to probate in Mississippi since the testatrix owned property in Mississippi.

2. The exception set out in Section 91-7-31 of the code is the only circumstance under which an original will may be removed from the clerk's office. The present situation does not come within that exception.

3. As a result of her being married to and living with a husband whose domicile was in Arkansas, the testatrix was, in legal contemplation, domiciled in Arkansas at the time of her death.

4. In her own mind, however, the testatrix' home, and her only home, was in Mississippi. The evidence before the court makes that conclusion inescapable. And the conclusion is equally inescapable that she intended for her estate to be "wound up" in accordance with Mississippi law — that is, with the death taxes being payable out of the residuary

along with the other liabilities of her estate. Any other conclusion would impute to her an intention, for instance, that her bequest of "$200.00 cash" to John Henry should be reduced by his proportionate part of the death taxes — and that is unthinkable. Furthermore, she must have realized that, while her debts were nil and her cash bequests totaled only $13,400.00, the death taxes would be considerable in amount and would probably exhaust her cash assets. Otherwise there would be no reason for her to use, in the residuary bequest, the phrase "any cash that I may have left." It cannot reasonably be concluded that the testatrix feared that her cash bequests and debts would exhaust all of her bank accounts, savings accounts, bonds and other cash-type assets.

From the foregoing it follows that it was the testatrix' intention that the death taxes be paid out of the residuary, and her will should be so construed.

A decree embodying these conclusions may be submitted — with all court costs being assessed against the estate.

March 13, 1974.

/s/ Herbert Fant, Chancellor

Original to Clerk for filing.

Copies to: Mr. Joel P. Walker, Attorney
Hernando, Mississippi 38632

Mr. Donald W. Pemberton, Attorney
1910 First National Bank Building
Memphis, Tennessee 38103

Mr. Pat Holcomb, Attorney
P.O. Box 368
Clarksdale, Mississippi 38614

EXHIBIT "B"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 48,377

IN RE ESTATE OF LULA S. TORIAN:
RALPH CRUM, ET AL 7787

V.

FIRST NATIONAL BANK OF MEMPHIS, EXECUTOR AND DOROTHY HOPE SULLIVAN, ET AL.

BEFORE PATTERSON, INZER, AND WALKER

INZER, JUSTICE, FOR THE COURT:

This is an appeal by Ralph Crum and others, the residuary legatees of the will of Lula S. Torian, from a decree of the Chancery Court of DeSoto County denying the petition of the executor to withdraw the original will and to transfer jurisdiction to the state of the domicile of the deceased, and from an adjudication that the estate tax is to be paid out of the residue of the estate. We affirm.

Mrs. Lula B. Sullivan Torian died on October 24, 1972, leaving a last will and testament executed on February 17, 1970, and two codicils, one dated March 26, 1970, and the other dated January 27, 1971. The will and codicils were executed in DeSoto County. The codicil dated March 26, 1970, appointed the First National Bank of Memphis as executor and directed that the executor use the law firm to which Joel Walker belonged in Hernando, Mississippi, as attorneys for the executor because of his long association with the family.

At the time of her death and at the time the wills and codicils were executed, Mrs. Torian's legal domicile was in

West Memphis, Arkansas. After her death, the executor filed a petition to probate the original will in DeSoto County. The petition alleged that the testatrix was a resident of Arkansas, that at the time of her death she owned no real property in Arkansas, and that she owned approximately 900 acres of land in DeSoto County, and that the probate of the will in DeSoto County, Mississippi, where the bulk of her estate was situated was necessary and desirable. On November 3, 1972, an order was entered admitting the will to probate and appointing the First National Bank of Memphis executor without bond. The executor qualified and letters testamentary were issued to it. Notice to creditors was published as required by law.

Clause I of the will as amended by the second codicil dated January 27, 1971, devised to Mrs. Torian's husband and the nine appellants herein all of her stock in Schlering-Plough Corporation to be shared equally. Clause II of the will devised to Ralph Crum, one of the appellants herein, nine or ten acres of land in DeSoto County, known as part of the "Old Cheatum Place." Clause III of the will bequeathed to her husband H. D. Torian $10,000 cash. Clause IV of the will devised $200 to the Methodist Children's Home in Jackson, and $2,000 to the Methodist Hospital in Memphis.

Clause V of the will devised to Dorothy Hope Sullivan, Robert Lamb Sullivan, David Sullivan and Warren Ware Sullivan all the remainder of decedent's land in DeSoto County consisting of 920 acres to be shared equally.

In Clause VII the testatrix provided that all the rest, residue and remainder, including any lapsed legacies in cash that she had left, was devised and bequeathed to the appellants, share and share alike.

On July 26, 1973, the executor filed a petition styled "Petition of Executor for Permission to Withdraw Original Will." The executor alleged that an authenticated copy of the will of Mrs. Torian had been probated in the Probate Court of Crittenden County, Arkansas, and that the bank had been appointed executor by the Arkansas Court. However, the executor alleged that there was some question about the validity of probate of the authentic copy of the will executed by a resident of Arkansas and that no authority appeared to exist to probate a copy of an original will of a resident of Arkansas.

The reasons given in the petition for the request that the original will be transferred to Arkansas was that decedent's will and codicil both stated that she was a resident of Arkansas, that at the time of her death she was married to Mr. Torian who was and still is a resident of Arkansas and that she died in Arkansas. Furthermore, the testatrix and her husband resided on property in West Memphis, Arkansas, to which reference was made in her will. All parties in interest were made parties defendant to the petition and process was issued for them.

The appellants, who are the residuary legatees, answered and joined in the prayer of the executor to be allowed to withdraw the original will so that it could be probated in Arkansas.

The appellees, all residents of Mississippi, to whom the 920 acres of land in DeSoto County was devised, answered the petition and denied that Mrs. Torian owned any land in Crittenden County, Arkansas, that was subject to probate. Appellees further alleged that the value of her personal estate in Arkansas was less than $3,000 and that under the laws of Arkansas no administration of the estate was

necessary. The answer alleged that the probate of the original will in DeSoto County was proper and that Section 509, Mississippi Code 1942 Annotated, prohibited the withdrawal of the original will after probate in Mississippi. The answer was made a cross-bill against the executor and alleged that the estate of Mrs. Torian was of such size that payment of federal estate taxes was required; that such taxes had not been paid; and that the non-payment of such taxes unnecessarily encumbered the title to the cross-respondents to the land devised to them. Cross-petitioners prayed that the executor be required to pay the proper estate taxes and to allocate the burden of such taxes as required by the laws of the State of Mississippi.

In answer to the cross-bill, the executor and appellants admitted that the estate would owe federal estate taxes, but alleged that a controversy existed between the beneficiaries of the estate as to the domicile of the decedent and the related question of which state's law should determine the proration of such taxes. The executor contended that since the decedent was a resident of Arkansas, the liability of the parties for the payment of the estate taxes should be determined by the probate court of the county in which the decedent was domiciled at the time of her death.

The pleadings raised two issues: one, whether the executor should be allowed to withdraw the original will in order that it would be probated in Arkansas; and two, if not so allowed to withdraw the original will, whether the Mississippi law or Arkansas law should be applied as to the payment of federal estate taxes.

The testimony reveals that Mrs. Torian, prior to her marriage to Mr. Torian in 1960, had lived in DeSoto County for many years. She was a good business woman and was

successful in operating her farming interests. She did her banking with the First National Bank in Memphis. At the time she married Mr. Torian she was 79 years of age. It was her first marriage and Mr. Torian was a widower who had retired. He evidently was a man of modest means and maintained a small residence in West Memphis, Arkansas.

After her marriage she lived with her husband in West Memphis, but continued to maintain her large home in DeSoto County and kept it staffed with two servants. Electrical and telephone service continued in the home, and some clothing and food were kept there. She also kept some of her jewelry in a safe. Until the last year before her death, Mrs. Torian came to Mississippi every week or two and would stay a day or two at a time and on occasions stayed much longer. She continued to supervise her farming interests, to keep her membership in the Methodist Church at Walls, Mississippi and to vote in Mississippi, she last voted in the two primaries and the general election in 1971. After her marriage, Mrs. Torian continued to refer to DeSoto County as her home.

At the time of her death, the only real property Mrs. Torian owned in Arkansas was an interest in the home in which she and Mr. Torian resided. The title to the property was in both parties as an estate in entirety and it passed to Mr. Torian by operation of law. She owned no personal property located in Arkansas except some personal effects and household furnishings valued less than $3,000.

Her bank accounts were all with Memphis banks and her stocks and bonds were in a lock box in the First National Bank of Memphis. After her death and after the will was probated in Mississippi, the executor took charge of these assets amounting to approximately $486,000.

The chancellor found that in view of the express provisions of Section 91-7-33, Mississippi Code 1972 Annotated, the original will was properly probated in DeSoto County, Mississippi, and that by virtue of Section 91-7-31, the original will could not be withdrawn from the clerk's office.

The chancellor further found that by virtue of her being married and living with her husband whose domicile was in Arkansas, the testatrix was legally domiciled in Arkansas at the time of her death, but in her own mind, her home and only home was in Mississippi. In the chancellor's opinion he stated that he found from the evidence that Mrs. Torian intended for her estate to be wound up in accordance with Mississippi law. As we construe his opinion, we determine that for that and other reasons, the chancellor found that the contacts of the forum state were of greater significance than those of the domiciliary state.

A decree was entered dismissing the petition to transfer jurisdiction to the probate court in Arkansas and directing that the estate taxes and all other liabilities of the estate, including administration expenses, be paid from the residuary estate.

On appeal, appellants argue two points for reversal of this case. Point I is as follows: Although the Mississippi court had jurisdiction to admit the will of the non-resident testatrix to probate, nevertheless, since the executor probated the will in this state by mistake and thereafter sought to withdraw the will to present it for probate in Arkansas, the domiciliary state, the Mississippi court as a matter of comity should have declined jurisdiction or deferred to the courts of the domiciliary state on the issue of which parties should bear the burden of estate taxes. Point II is as follows: Having assumed jurisdiction the

Mississippi court should have applied the law of Arkansas to determine which parties should bear the burden of estate taxes, absent a clearly expressed intent to the contrary. The law of the state of the domicile governs that determination. Arkansas law compelled the appointment of such taxes.

We find no merit in either of these arguments. As to Point I it is clear from the record that the will was not probated in Mississippi by mistake. In fact, the petition to withdraw the original will and transfer jurisdiction to Arkansas does not allege that the will was probated in Mississippi by mistake. Neither is there any proof that the will was probated in Mississippi through mistake. The only testimony even tending to show a mistake was the testimony of Mr. Blumenthal, the present trust officer of the bank, who drew a conclusion on behalf of the bank that it was a mistake to offer the will for original probate in Mississippi when the testatrix was domiciled in Arkansas at the time of her death. However, Mr. Blumenthal was careful to point out that he was not the trust officer at the time the will was probated in Mississippi and that he had no idea as to what prompted the bank to offer the will for probate in Mississippi instead of Arkansas. He then said.

> All I can say is that we found ourselves in this present situation. We found an ambiguity of tax law and in attempting to clarify what we should do we sought the best way to bring it to the Court's attention. I don't believe that we have made any intentional mistakes or any mistakes otherwise.

The chancellor correctly held by virtue of the provisions of Section 91-7-33 the original will was properly probated in Mississippi in the first instance. The chancellor also correctly held that since the original will was probated in this

state Section 91-7-31, prohibited withdrawal of the original will.

Having assumed jurisdiction, the Mississippi court was not required by comity to defer to the courts of the domiciliary state on the issue of which of the parties should bear the burden of the estate taxes. To have done so would have been contrary to the public policy of this state announced by our statutes and decisions of this Court.

The forerunner of Section 91-7-33, supra, was construed in *Carroll v. McPike*, 53 Miss. 569 (Br. & Hem. 1876):

> The general doctrine, as declared by Story, in Conflict of Laws, §518, is that an administration in any other country than that of the domicile of the deceased is treated as in its nature ancillary merely to that in the country of the domicile, because "the final distribution of his effects among his heirs or distributees is to be decided by the law of his domicile." This reason wholly fails in its application to this State, and the doctrine built on it is entirely subverted by our statute, declaring that personal property situated in this State shall descend and be distributed according to the laws of this State, notwithstanding the domicile of deceased may have been in another state. Code, §1950. In this State administration of the effects here of a deceased person, no matter where his domicile was, is independent of all other administrations, and to be conducted in all respects as if the decedent had been a citizen of this State, when he died. Debts are to be paid according to the assets and any surplus is to be distributed here. All creditors, no matter where residing, nor where the debts were contracted, are entitled to prove their claims

here, and proceed in our courts to enforce them, and to share in the assets here. (53 Miss. at 576, 577).

Bolton v. Barnett, 131 Miss. 821, 95 So. 721 (1923), involved the will of Mrs. Bolton who resided with her husband in Memphis, Tennessee, at the time of her death. She had lived until a few years before her death in Prentiss County, Mississippi. She owned a home and some small amount of personal property in Mississippi, and after her death, her original will was probated in the Chancery Court of Prentiss County, where the property was situated. The question was raised as to whether the Chancery Court of Prentiss County had jurisdiction, and this Court pointed out that under the provisions of Section 2004, Code of 1906, now Section 91-7-33, Mississippi Code 1972 Annotated, the original will could be proven and admitted to probate in the first instance in Mississippi, and that the Chancery Court of Prentiss County had jurisdiction to admit the will to probate and to construe it. A question was also raised as to the right of the husband of the testatrix to renounce the will, since under the law of Tennessee, the domicile of the deceased, the husband had no right to renounce the will. In answer to this contention, this Court stated:

> Because of our present laws, in some ways peculiar, with reference to personal property, and especially so because of the special permission to originally probate a foreign will here, these probates and administrations are now original, and in no way ancillary to the probate at the domicile of the testator.
>
> Since the original will may be probated here, it follows as a matter of right and justice that it may be renounced here in accordance with our statute upon renunciation. The Garland case, supra, says the right of

renunciation is available only in the proper tribunal of the testatrix's domicile because it is an incident to the jurisdiction of the tribunal which has exclusive power to admit the will to probate, and proceeds from the jurisdiction over the matter to probate. *Under our present law our court has the jurisdiction to admit the will to probate in the first instance, and therefore, the right of renunciation pertains to this tribunal. We neither look to the state of the domicile of the testator for the power to renounce nor to the share to be taken upon the renouncing of the will either of the real estate or the personal estate situated here, but look to our own laws for both because of the original probate of the will here.* Under our laws the husband has the right to renounce the will. This statute does not give the right of renunciation to only citizens of this state, but gives it to any husband or wife upon the probate of the will of the deceased. (Emphasis added). 131 Miss. at 826, 827, 95 So. at 726.

As to the payment of debts and expenses of administration of the estate the pertinent part of Section 91-7-91, provides:

> The goods, chattels, personal estate, choses in action, and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal or otherwise, and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be assets and shall stand chargeable with all the just debts, funeral expenses of the deceased, and the expenses of settling the estate. The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and

above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed.

It is clear from this statute and the decisions of this Court that in the absence of a contrary provision in a will, resort must first be had to the personal property in the payment of debts and expenses of the estate including federal estate taxes, before resort may be had to real property. It is also clear that resort must be first had to personal property not specifically devised by the will. *Temple v. First National Bank of Meridian,* 202 Miss. 92, 30 So.2d 605 (1947); *Gaines v. Klien,* 203 Miss. 271, 34 So.2d 489 (1949); and *Riegelhaupt v. Ostroffsky,* 237 Miss. 521, 115 So.2d 331 (1959).

Appellants cite numerous cases from other jurisdictions which hold that the apportionment of federal estate taxes when a decedent owns property in several states should be determined by the law of the decedent's domicile. Appellants rely heavily on *Mazza v. Mazza,* 475 F.2d 385 (D.C. Cir. 1973), in support of their argument that the law of the decedent's domicile should control. In *Mazza,* the decedent was domiciled in Maryland and his will was probated in Maryland. Maryland also had a statute providing for apportionment of federal estate taxes. After his widow paid the estate taxes she sued in the District of Columbia seeking contribution from decedent's sister, who inherited by operation of law some of the property located in the District. Although the District of Columbia did not have an apportionment statute, the federal court declared that the law of Maryland should apply in such a case. However, that court did not arbitrarily apply the rule of decedent's domicile, but held that Maryland's law should apply under the

"interest analysis approach." Maryland clearly had a greater interest in the controversy, and the court stated:

> The relevant inquiry focuses on the relationship of the two jurisdictions to the controversy, the interest involved and whether the application of the foreign law would offend a strong and clearly defined local policy. (475 F.2d at 391).

In the case before us, the forum state, Mississippi, and not the domiciliary state, Arkansas, had the greater substantial interest in this controversy. The application of the Arkansas statute would not serve the State of Arkansas or any citizen thereof. The property in Arkansas went to decedent's husband and is unaffected by the Arkansas apportionment statute which provides that no such taxes shall be apportioned against the surviving spouse with respect to property received by such spouse, the value of which is deductible for federal estate tax purposes. Thus, the only interest that the State of Arkansas has in this litigation is the fact that the domicile of the decedent was in Arkansas at the time of her death. On the other hand, the situs of the real property involved is in Mississippi, and the specific devisees to be affected are residents of Mississippi. The residuary legatees are residents of Tennessee. The personal property which decedent left was all located in the State of Tennessee at the time of her death and is now in the hands of the executor and subject to the Chancery Court of DeSoto County, Mississippi. We held in *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968), that a case is to be governed by the law of the forum unless it is expressly shown that a different law applies, and that in case of doubt, we will naturally prefer the laws of our own state. Here, Mississippi has the dominant interest and applying the "interest analysis ap-

proach," the court correctly held that the Mississippi law would apply. Furthermore, to apply the Arkansas apportionment statute, would be repugnant to the public policy of this state.

We hold that the chancellor was correct in holding that the estate taxes should be paid according to Mississippi law. The executor was under no compulsion to probate the will in Mississippi and having submitted itself to the jurisdiction of the Chancery Court of DeSoto County and collecting the assets pursuant to Letters Testamentary granted in DeSoto County, Mississippi, the estate taxes and other debts of the estate must be paid in accordance with the Mississippi law.

For the reasons stated, the decree of the Chancery Court of DeSoto County must be and is affirmed.

AFFIRMED.

Gillespie, C.J., and Rodgers, P.J., and Smith, Robertson, Sugg and Broom, J.J., concur.

EXHIBIT "C"

IN THE PROBATE COURT OF CRITTENDEN COUNTY, ARKANSAS

IN THE MATTER OF: THE ESTATE OF
LULA S. TORIAN DECEASED No. 3556

ORDER DENYING SPECIFIC CREDITS OF ACCOUNTING

Now on this 22nd day of November, 1976, the matter comes on to be heard. The executor appears by its duly authorized representative, Robert P. Blumenthal, and two of its attorneys, Ben Adams and Jake Brick. The objecting

legatees appear by two of their attorneys, John Porter and Elton A. Rieves III. Whereupon, this matter is submitted to the Court upon the accounting filed herein, the objections and amendments thereto, the responses of the executor to said objections, as amended, briefs submitted by all parties, argument of counsel, testimony of the witnesses, together with exhibits introduced into evidence, the entire record herein and other matters, things and proof before the Court, from all of which the Court doth find:

1. That this matter was originally set for trial on August 20, 1976. That at such time, the Court observed that the decedent's next of kin and the beneficiaries under the Last Will and Testament of the decedent had not been notified of the appointment of the executor and had not been given notice of the inventory and accounting filed in this cause. That at such time the Court continued the hearing until September 27, 1976, and directed that the executor give the proper notices in accordance with law. That such notices were given to all interested persons, and at the time this matter was heard on September 27, 1976, all interested persons had been duly notified, in writing, pursuant to law.

2. That at the conclusion of the evidence on September 27, 1976, this hearing was continued until this date.

3. That the Court's ruling is contained in a written memorandum opinion, filed, or to be filed in this cause, a copy of which is attached hereto and made a part hereof as though fully set out herein word for word.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that:

1. Specific credits contained in the accounting, as

itemized in the memorandum brief, totaling $229,114.34, be and the same are hereby denied.

2. The matter of executor and attorneys' fees are reserved for future order.

3. The executor be and it hereby is directed to submit to the Court, within twenty days from November 22, 1976, its plan for disbursement of this estate.

4. The executor be and it hereby is directed not to remove or transfer any part of this estate to the state of Mississippi without prior order of this court.

5. The prayer for interest made by the objecting legatees is denied.

ENTERED this 24th day of November, 1976.

/s/ Henry Wilson, Probate Judge

Estate of Lula S. Torian, deceased.
Crittenden Probate No. 3556

MEMORANDUM OPINION

Lula B. Torian, a resident of 1929 McAuley Drive South, West Memphis, Arkansas, died in said city October 24, 1972, leaving as her last will and testament a written instrument dated February 17, 1970, a codicil thereto dated March 26, 1970, and a second codicil thereto dated January 27, 1971.

All instruments declared and set forth decedent's residence in West Memphis, Arkansas, were witnessed by Joel P. Walker, an attorney at Hernando, Mississippi, and the first codicil directed First National Bank of Memphis, Memphis, Tennessee (hereinafter referred to as First National) serve as executor of her estate, and that said

executor use Mr. Walker's law firm as attorneys for the estate.

First National is a large financial institution, with a trust department of over two hundred employees, which contends it is capable, competent and qualified to efficiently serve as personal representative for estates in the Memphis area, including the administration of estates in the States of Arkansas and Mississippi. That said First National is, and for the purpose of this proceeding, charged with full and complete knowledge of the Probate Laws of Arkansas and Mississippi, the effect thereof, its duty thereunder and responsibility to comply therewith.

That on November 3, 1972, on petition of First National said will and codicils were admitted to probate in the Chancery Court of DeSoto County, Mississippi, with said First National being appointed as executor of that part of decedent's estate in Mississippi.

Sec. 62-2104 Ark. Stats. sets forth the powers granted by Arkansas to a nominated executor prior to appointment, one of which is to "take such steps as are reasonably necessary in management and preservation of the property and rights of the decedent."

On January 23, 1972, again on petition of First National, authenticated copies of said will and codicils, duly proven, were admitted to probate in the Probate Court of Crittenden County, Arkansas, with First National being appointed as executor of this, the domicilary Arkansas estate of Mrs. Torian. A will may be admitted to probate in Arkansas although it may be "without the state." Ark. Stats. 62-2106.

At this point in time January 23, 1972, there were two *separate and independent* (and I emphasize separate and

independent) probate proceeding, with First National serving as executor of each. The proceeding in Mississippi related to and could only be an administration of that part of decedent's estate in Mississippi. The Arkansas proceeding being the domiciliary administration, related to and did constitute the administration of the balance of decedent's estate outside of Mississippi, including intangible personalty located in Arkansas and Tennessee. This was set at $486,-000.00 by First National in its initial petition for an Arkansas administration, and is shown to be $636,977.58 in the accounting filed herein June 7, 1976. The Arkansas estate tax return filed by First National reflects an Arkansas estate of $505,102.25.

On May 9, 1973, First National, without notice to any interested party, filed in this Arkansas proceeding its petition and secured an order to delay filing an inventory.

No further action was had in the Arkansas administration of Mrs. Torian's estate until April 15, 1976 (a period of almost three years), when a petition for an order to require the filing of an inventory and accounting and to proceed with distribution was filed. Pursuant to the order entered on said petition, First National filed its inventory, showing that as of June 2, 1976, it, as executor of the Arkansas estate, had received into its hands assets of said estate amounting to $495,626.29, and on the same day filed an accounting for the period from October 24, 1972, until April 30, 1976, showing it had received a total of $636,977.58, had paid $10,000.00 to a distributee and that it seeks credit for $425,416.34 paid to others than distributees. It should be noted here that First National did not include in such Arkansas inventory or accounting, any part of Mrs. Torian's estate in the State of Mississippi.

The $425,416.34 of expenditures First National now seeks approval of was paid during the period November 10, 1972, until April 12, 1976. No claim was filed, no authorization sought and no order entered in this court for any of such payments. A great number of the payments set forth in First National's accounting for the Arkansas estate are clearly improper, many relate only to the Mississippi proceeding, and some are not adequately documented.

Section 62-2613, Ark. Stats. provides that "all payments made by the personal representative without order of Court shall be at his own peril."

First National asserts that these expenditures were proper because they were made pursuant to decrees entered in the Mississippi administration of decedent's estate by the Chancery Court of DeSoto County. It is charged that the residuary beneficiaries were parties to the proceedings in Mississippi, that the Mississippi Court's decision is entitled to full faith and credit, and that the question of the propriety of such expenditures is res adjudicata by reason of such Mississippi decrees.

The Mississippi hearing began upon First National, previously appointed as Mississippi executor, on July 26, 1973, filing with the Mississippi Court, its petition to withdraw the original will and codicils. Residuary beneficiaries were named as respondents to such action and they filed answer agreeing to and seeking such withdrawal. Other respondents, devisees of the principal Mississippi real estate, objected to such withdrawal and filed a Cross-Bill to require the executor in Mississippi to pay Federal Estate taxes on the Mississippi lands. To this Cross-Bill First National, as the Mississippi executor of Mrs. Torian's estate filed answer. There is nothing in the record to show that

the residuary beneficiaries of Mrs. Torian's will were ever served with or waived process on the Cross-Bill. I only comment on this in passing, for I do not believe it of importance to a decision here.

First National as executor of Mrs. Torian's Arkansas estate was not a party to the Mississippi proceeding and therefore, neither such executor or said estate are subject to decisions of the Mississippi Courts. Such decisions can only extend to the extent of Mrs. Torian's Mississippi estate, being administered by the Mississippi executor. Any decision of the Mississippi Court, rendered in a proceeding to which Mrs. Torian's Arkansas estate was not a party, providing for payment of claims and expenses from and directing disposition of such Arkansas estate is clearly beyond the jurisdiction and power of the Mississippi Courts, a nullity and void. To the extent that the Mississippi decrees are directed to First National as executor of Mrs. Torian's Mississippi estate and relate to property of the estate within the State of Mississippi, they will be given full faith and credit by this court.

On January 25, 1974, First National as executor of Mrs. Torian's Mississippi estate, filed its petition in the Chancery Court of DeSoto County for authority to pay Federal Estate Tax. On January 25, 1974, and February 4, 1974, a decree and an amended decree was entered by said Mississippi Court, authorizing First National as executor "in this cause" to proceed with payment of Federal Estate Tax "out of assets held by the (Mississippi) Executor." The word Mississippi must be read into the order.

On March 26, 1974, the Mississippi Court denied First National's petition as Mississippi executor to withdraw the original will and codicils, entered an order construing the

will and directed First National as the Mississippi executor to proceed accordingly in the administration and distribution of "said estate". "Said estate" could only refer to that part of decedent's estate in Mississippi. The executor of the Arkansas domiciliary estate was and is not subject to such order, and this court is not required to give full faith and credit to it as an order against the Arkansas estate.

A large part of the expenditures for which First National as Arkansas executor, requests approval by this court, are payments for Federal and Mississippi Estate Tax.

Section 63-150 Ark. Stats. sets forth the policy and law of the State of Arkansas and provides for spread of the burden of State and Federal Estate, Death and Inheritance Taxes proportionately among the distributees and/or beneficiaries of the estate. This court is bound to uphold such policy and follow Arkansas law in the administration of an admittedly Arkansas estate.

The petition of First National for approval of its accounting filed herein, will to the extent of the following specific credits sought, be denied:

1973			
7/ 6	192752		$150.00
7/23	193607		325.00
12/10	201678		6.12
1974			
1/15	203811		40.00
1975			
1/ 9	336583		50.00
6/30	237412	Denied in amount of	77,257.85
11/25	245732		12,697.86
11/25	245731	Denied in amount of	76,406.60

1976

4/ 9	254654	Denied in amount of	51,188.24
4/12	254752		10,992.67

Reductions of credits sought for payment of Federal Estate Taxes have been in the amount of 58.98 percent, the amount the Mississippi estate bears to Mrs. Torian's total estate.

At this time, it appears to this court that First National is relegated to proceeding in Mississippi, to recover for advances made by the Mississippi executor to the Mississippi estate. Of course this is only of academic interest as this court has no control or interest in the Mississippi proceedings.

I could comment at great length upon the administration of this estate, however it would be of little benefit at this time. First National, if not sadder, should be a wiser institution.

The question of executor and attorneys fees are reserved for future order. The executor is directed to submit within twenty days, its plan for disbursement of this Arkansas estate.

No part of this estate shall be removed or transferred to the State of Mississippi without prior order of this Court.

A precedent pursuant to the foregoing opinion shall be submitted.

EXHIBIT "D"

SUPREME COURT OF ARKANSAS
DIVISION 2

No. 77-283

IN THE MATTER OF THE ESTATE OF LULA S. TORIAN, DECEASED AND THE FIRST NATIONAL BANK OF MEMPHIS, MEMPHIS, TENNESSEE ..... *Appellant*

V.

LOUISE CRUM SMITH, ET AL ..... *Appellees*

Opinion Delivered April 24, 1978.

APPEAL FROM CRITTENDEN PROBATE COURT

HENRY WILSON, *Judge*

Affirmed On Direct Appeal
Affirmed On Cross-Appeal

FRANK HOLT, *Associate Justice*

This appeal results from a conflict of laws with respect to the apportionment and payment of estate taxes. The decedent, Lula S. Torian, age 81, died testate on October 24, 1972, while a resident and domiciled in Arkansas. She was survived by her husband, H. D. Torian. Her will, executed in Mississippi, nominated the appellant, First National Bank of Memphis, to be executor of her estate. The will made no provision as to how the inheritance taxes were to be paid by her estate. The named executor filed a petition in a Mississippi State court on November 3, 1972, to probate the original will and codicils there. The petition alleged that, although the testatrix was a citizen and resident of Crittenden County, Arkansas, she owned no real property in

Arkansas and, because she owned approximately 900 acres of land (later valued at $1,000 per acre for tax purposes) in DeSoto County, Mississippi, probate of the will there was necessary and desirable. The petition was granted on the date it was filed and the appellant bank appointed executor. On December 7, 1972, the executor bank filed an inventory of the estate, listing personal property in Mississippi valued at $1,000. It appears the real and personal property located in Mississippi consisted of approximately 59% of the total estate.

On January 23, 1973, the executor filed a petition, which was approved that date, to probate the will in Crittenden County, Arkansas. Attached to the petition was an authenticated copy of her will and codicils together with the Mississippi order admitting the will to probate there. It was requested that the assets of the estate in Mississippi be administered according to the laws in Mississippi and the personal property in Arkansas, valued at approximately $486,000, be administered according to the laws of Arkansas. Letters testamentary were issued to appellant First National appointing it executor of decedent's Arkansas estate which was found to consist of personal property valued as stated. The Arkansas probate court further found that it was necessary to probate the will in Arkansas and Mississippi to fully administer the estate and make a proper distribution of the property. The order stated that the assets in Arkansas would be administered according to Arkansas law and those in Mississippi under its law. It appears that the assets in Arkansas comprised approximately 41% of the total estate.

On May 9, 1973, appellant First National filed a petition with the Arkansas court requesting postponement of

the filing of an inventory since a question had arisen as to the proper forum for original jurisdiction to probate the will. The court postponed the filing of an inventory until this determination was made. On July 26, 1973, appellant First National, upon advice of its Mississippi counsel, filed a petition with the Mississippi court for permission to withdraw the original will and transfer it to Arkansas. The petition recited that the decedent owned about 920 acres in DeSoto County, Mississippi, and a residence in West Memphis, Arkansas, with her husband as tenants by the entirety; that an authenticated copy of the will, previously admitted to probate in Mississippi, was afterwards probated in the probate court of Crittenden County, Arkansas; and that the appellant is advised there is some question about the validity of a probate of a will of an Arkansas resident by an authenticated copy rather than the original. Further, a transfer of the original will was requested for the reason that the decedent's will and codicils recite that she was a resident of Arkansas at the time of her demise in Arkansas, and she was married to an Arkansas resident and resided with him on property jointly owned by them in Arkansas. The several specific or residuary legatees (Tennessee residents except one), the appellees here, and the specific devisees of the 920 acres in Mississippi (Mississippi residents) were made respondents. The executor requested that process issue requiring respondents to show cause why the original will should not be withdrawn from the Mississippi court for the purpose of filing it in the pending proceeding in the Arkansas probate court. The residuary legatees answered and joined in the executor's petition. The specific devisees of the Mississippi lands answered controverting the petition to withdraw the original will.

By cross-bill against the executor, the specific devisees of the 920 acres sought an accounting and the payment of the federal estate taxes by allocating the burden of the taxes pursuant to the laws of Mississippi. The appellant executor, the only named party in the cross-bill, answered admitting federal estate taxes would be owed; also there was a controversy over which state law applied to determine proration of the estate tax liability; and since the decedent was an Arkansas resident, the Arkansas court should first determine the estate tax liability of the respective parties.

The Mississippi court denied the petition to withdraw and transfer the original will for filing in Arkansas. Further, it determined that the decedent's will, pursuant to Mississippi law, should be construed to require the payment of all estate taxes and other liabilities and expenses from the residuary estate. The residuary legatees (the appellees here), feeling aggrieved by the decree, appealed the decision to the Mississippi Supreme Court asserting that although the Mississippi court had jurisdiction to probate the will, it should have deferred jurisdiction to the Arkansas court, as a matter of comity, on the issue of who should bear the tax burden or should have applied Arkansas law. Under Ark. Stat. Ann. §63-150 (Repl. 1971), the tax liability would be apportioned equally among all beneficiaries of the estate. On November 3, 1975, the Mississippi Supreme Court affirmed the lower court's finding that it is not required by comity to defer to the Arkansas court or apply the Arkansas apportionment statute on the issue of who bore the tax liability because the forum state (Mississippi) and not the domiciliary state (Arkansas) had the greater substantial interest in the controversy under the "dominant

interest" and "interest analysis approach." Also the will was not probated in Mississippi by mistake nor compulsion. Therefore, the residuary legatees must bear the burden of all estate taxes and expenses.

Thereafter, in April, 1976, the residuary legatees, appellees here, filed a petition in the pending proceeding, which had been held in abeyance, in the Arkansas probate court requesting an order directing the appellant executor to file its inventory and final accounting in the Arkansas court. The executor filed its accounting which indicated that the Arkansas administration had approximately $496,626.29 at its inception consisting of cash, bonds, securities, etc. Credits were claimed against those assets of the estate in Crittenden County, Arkansas, for the amounts that the executor had paid for federal, Mississippi and Arkansas estate taxes following the decision of the Mississippi Supreme Court. Appellees objected to the accounting asserting that they, as residuary legatees, had been wrongfully charged in the sum of approximately $228,000; *i.e.*, the executor had not apportioned the taxes pursuant to Arkansas law. Appellant executor asserted that since the residuary beneficiaries, appellees, were parties to the Mississippi proceedings or the appeal there, that the Mississippi Supreme Court decision was entitled to full faith and credit, and the question of the propriety of the expenditures for taxes was *res judicata* in the case.

The Arkansas probate court held that appellant First National, in its capacity as executor of the deceased's Arkansas estate, was not a party to the Mississippi proceeding and, therefore, neither the executor nor the Arkansas estate was subject to the decision rendered in Mississippi. The court commented that the record of the Mississippi

proceeding did not disclose that the residuary legatees, appellees, were ever served with or waived process on the cross-bill but reasoned this fact was unimportant in that the Mississippi court only had jurisdiction of appellant First National as executor of the Mississippi estate, and the decree was entitled to full faith and credit only as to disposition of the Mississippi estate. Accordingly, the Arkansas probate court denied credits totaling $229,114.34, which were claimed by the executor, for the disbursements it had made, pursuant to Mississippi law, from the Arkansas assets in payment of the entire estate tax liability without the Arkansas court's approval. The Arkansas court also ordered the disbursement of the assets of the Arkansas estate to the objecting legatees, appellees, according to the Arkansas apportionment law. The court awarded the executor a fee of $4,000 for its services and its counsel a fee of $5,000.

On appeal here, the appellant executor first contends the court erred in failing to hold the entire decision of the Supreme Court of Mississippi was entitled to full faith and credit and that the doctrine of *res judicata* applied to the issue of the allocation of the estate tax liability. It is well settled that under the full faith and credit clause of the United States Constitution, Art. IV, §1, a foreign judgment is conclusive on collateral attack, except for the defenses of fraud in the procurement of the judgment or want of jurisdiction in the court rendering it. *Purser v. Corpus Christi State National Bank*, 256 Ark. 452, 508 SW2d 549 (1974). Here we are of the view that the Mississippi court decision was not entitled to full faith and credit in its entirety because the court lacked jurisdiction over the Arkansas *res* or that portion of the estate of which Arkansas had acquired jurisdiction.

In *Simmons v. Simmons*, 203 Ark. 566, 158 SW2d 42 (1942), we held that "the situs of personal property is the residence of the owner" and the property located in this state is "not subject to the foreign jurisdiction." Further, it is the general rule of law adopted from the common law that the personal estate of a "decedent is a legal unit, having its *situs* at the owner's domicile," and "the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicile of the deceased owner." *Baker v. Baker, Eccles & Company*, 242 U.S. 394 (1917). Here the deceased was a resident and domiciliary of Arkansas. Therefore, the personal property, approximating $500,000 in stocks, bonds, cash, etc., physically located in the appellant bank in Memphis, Tennessee, had its legal situs in Arkansas.

In Leflar, American Conflicts of Law, §205 (3rd. Ed. 1977), it is stated: "Tangible personalty is for the most part subject to administration at the place of its situs, and nowhere else." Further it is also said:

> Once a chattel is properly subjected to administration in any state, it is technically owned by the administrator there, for purposes of administration .... If, however, the chattels have already come under the control of an administrator at their original situs, ... the situs administrator's claim to the chattel is superior.

Here it appears that the Mississippi court never attempted to take control over the personal property located in Memphis. The executor filed an inventory and appraisement of the decedent's personal property with the Mississippi court which only listed "furniture and furnishings located in DeSoto County, Mississippi," valued at approxi-

mately $1,000. The first court to assert jurisdiction over the personalty in the Tennessee bank was the Arkansas court in its probate order on January 23, 1973. This was proper and in accord with the recited rule of law that the situs of personal property is at the residence or domicile of the owner. Further, *in rem* jurisdiction is founded upon physical power and the "basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." *Hanson v. Denckla,* 357 U.S. 235 (1958). Therefore, the Mississippi State court lacked *in rem* jurisdiction over the Arkansas assets of the estate.

Even so, appellant contends by virtue of its personal jurisdiction over the parties, the Mississippi court's judgment is entitled to full faith and credit. Here it is argued that the Mississippi court had personal jurisdiction over the parties, including the appellees who by their appearance and appeal of the Mississippi trial court's decision, submitted themselves to the Mississippi Court's jurisdiction. As appellant argues, the basic question litigated there was what law should apply to determine the allocation of liability from the estate's assets for estate taxes. However, personal jurisdiction over the parties and litigation of this issue does not entitle the Mississippi judgment to full faith and credit in Arkansas as to the Arkansas assets. As was stated in *Carpenter v. Strange,* 141 U.S. 87 (1891):

> Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, (*Massie v. Watts,* 6 Cranch, 148), yet it does not follow that such a decree is in itself necessarily binding upon the courts of the State where the land is situated. To

> declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*.

Here, although personal property is involved rather than real property as in *Carpenter, supra*, the question of power to render a binding judgment over the propety is analogous.

Here the Mississippi State court ruled that the will was properly admitted to probate in Mississippi and that its laws would determine who should bear the burden of the estate taxes. The Mississippi Supreme Court affirmed, recognizing the general rule that the final distribution of a decedent's effects is to be decided by the law of his domicile; however, it did not apply in Mississippi because of its statute "declaring that personal property situated in this State shall descend and be distributed according to the laws of this State, notwithstanding the domicile of deceased may have been in another State." Here the personalty involved was not situated in Mississippi. The Mississippi judgment was entitled to full faith and credit in Arkansas as far as it concerned property in Mississippi, but it had no effect *in rem* upon the property legally situated in Arkansas. Accordingly, it was not entitled to full faith and credit nor *res judicata* effect on the issue of allocation of tax liability in regard to the assets of the Arkansas estate.

Appellant contends the court erred in applying the Arkansas estate tax apportionment statute to Mississippi real estate because it was without jurisdiction to do so. Suffice it to say that the Arkansas Probate Court recognized that it had "no control or interest in the Mississippi pro-

ceedings." It merely denied the executor the credits sought for the payment of the entire estate tax liabilities out of the Arkansas estate.

Appellant next asserts the court abused its discretion in awarding an unreasonably low fee ($4,000) to it. Appellate review of probate cases is *de novo*, as in equity cases, and on appeal we will consider improperly excluded evidence. *Price v. Price*, 258 Ark. 363, 527 SW2d 322 (1975). Therefore, before reaching appellant's contention, we first determine whether the exclusion of an attorney's testimony on the ground of attorney-client privilege was improper.

Here the executor, in its petition for allowance of executor's and attorneys' fees, asserted that the attorney Spears had been employed initially to render services for the Arkansas estate proceedings. The proffered testimony of Spears by appellees related to a consultation which took place a few days before the will was first filed for probate in Mississippi by appellant. According to this attorney, he had advised the appellant that Arkansas and not Mississippi was the proper forum to probate the will. Also, that probating the will in Mississippi would result in exhausting the residuary estate and the devisees of the Mississippi lands would be free of taxes "with a million dollars worth of land."

In *Francis v. Turner*, 188 Ark. 158, 67 SW2d 211 (1933), we stated that it was a settled principle "that an attorney for an estate represents the heirs and distributees and legatees" . . . . and is in "a position of trust with respect to all those interested in the estate." An executor or administrator is in a similar position of trust with regard to all those interested in the estate. *Hobbs v. Cobb*, 232 Ark. 594,

339 SW2d 318 (1960). Here the appellant executor, in consulting with the attorney Spears, was necessarily acting for both itself as executor and for the beneficiaries under the will.

In regard to the attorney-client privilege, Ark. Stat. Ann. §28-1001, Rule 502(3) (Noncum. Supp., 1976), provides:

> (d) Exceptions. There is no privilege under this rule.
> (5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients. . . .

In a similar situation involving a shareholder's derivative suit against a corporation, the corporation's claim of privilege regarding the advice given it by its attorney was said not to be privileged from disclosure in the action. *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). Here the fee sought by the executor was to be paid out of the estate. We are of the opinion the attorney-client privilege was inapplicable and the testimony admissible on the issue of the reasonableness of the executor's fee.

Appellant argues with respect to its executor's fee that, based upon the value of the personal property passing through its hands in the State of Arkansas and the problems involved in administering the estate, it was entitled to a fee of approximately $20,000 pursuant to Ark. Stat. Ann. §62-2208(d) (Repl. 1971) rather than the $4,000 allowed. Under §62-2208(c), the court, in its discretion, may deny

totally or reduce the compensation to a personal representative who has failed to file a satisfactory account or perform any other substantial duty pertaining to its office. Here the administration of the Arkansas estate was first begun in January, 1973, and the matter is still not resolved. It appears that this delay was primarily due to the appellant executor initiating the original probate in Mississippi in disregard of the advice of its Arkansas counsel. This has threatened the assets of the Arkansas estate to near total depletion. Accordingly, we find no abuse of the court's discretionary authority under §62-2208(c) in allowance of only a $4,000 fee.

In regard to the $5,000 attorneys' fees awarded by the court, we cannot agree that the sum awarded was unreasonable or insufficient as to constitute an abuse of discretion. Appellant sought compensation for its current attorneys in the sum of approximately $17,000 using the statutory standard set out in §62-2208(d). However, the court, if it determines the schedule of fees to be excessive under the circumstances, is empowered to allow a fee commensurate with the value of legal services rendered. Appellant argues the fees allowed its current attorneys, Brick and Adams, for services they performed for the executor after April 15, 1976, were inadequate based upon any criteria. Appellees agree that the award was not commensurate with the value of the services rendered. However, they assert, as the trial court found, the bulk of the services were performed on behalf of the executor in its individual capacity to obtain credits for tax payments made out of the Arkansas assets of the estate. This action was actually in derogation of the interests of the appellees or residuary legatees. In the

circumstances, we perceive no abuse of discretion in the award of $5,000 in fees. See *Jacoway v. Hall,* 67 Ark. 340, 55 SW 12 (1900).

Appellees, by cross-appeal, assert the court erred in failing to charge the executor with the decrease in value of 1,560 shares of stock held during the preceding four year period of the administration of the estate. Appellees argue that the stock had decreased in value in the amount of approximately $35,000 or one-half since the time distribution should have been made and that the delay in distribution is solely attributable to appellant's negligence. The trial court determined the appellees were partially responsible for this decrease in value and denied the requested relief and we agree. The officials of appellant First National had consulted with the appellees, the residuary legatees, concerning this stock. They gave their written authorization to sell one-half of the stock to cover potential federal, Mississippi and Arkansas estate taxes, liabilities and expenses. Also discussion were held as to the necessity of retaining the rest of the stock without making distribution. Additionally, appellant discussed with appellees' attorney the problems of tax allocation and the effect on ultimate distribution. Neither the appellees nor their attorney requested a distribution at any time or any other action regarding the balance of the stock. Certainly, we cannot say that the court's finding that appellees were partially responsible for the stock's decrease in value is against the preponderance of the evidence.

Affirmed on direct.

Affirmed on cross-appeal.

We agree: Harris, C.J., and Fogleman and Byrd, JJ.

EXHIBIT "E"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 2, 1978

John C. Speer, Esq.
Heiskell, Donelson, et al.
First Tennessee Bldg., #2020
Memphis, TN 38103

RE. First National Bank of Memphis
v. Louis Crum Smith, et al.
No. 78-92

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Mr. Justice White, Mr. Justice Blackmun and Mr. Justice Powell would grant certiorari.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By: /s/ Edward Faircloth
Assistant Clerk

NOTICE OF HEARING ON APPLICATION
FOR PRELIMINARY INJUNCTION
(Filed November 17, 1978)

Notice is hereby given that the Court will conduct an evidentiary hearing on Friday, December 15, 1978, at 10:30 a.m. in Courtroom Number Two, United States Courthouse,

Memphis, Tennessee, upon the application of the plaintiff for a preliminary injunction as prayed for in numbered ¶ 4 on page 9 of the Complaint.

Counsel for the parties are directed to attend a conference in the chambers of the Court at 1:15 p.m. on Wednesday, December 13, 1978. At that conference counsel and the Court will undertake to establish any matters pertaining to the hearing which are undisputed. Counsel should also be prepared to advise the Court upon their respective contentions and the authorities to be relied upon to the extent possible.

On Friday, November 17, 1978, the Court denied an *ex parte* application for a temporary restraining order and indicated that the motion for temporary restraining order would be considered a motion for a preliminary injunction to be heard on December 15, 1978, as set forth above.

ENTER: This 17th day of November, 1978.

/s/ Robert M. McRae, Jr., Judge

EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER AND MEMORANDUM
(Filed November 17, 1978)

1. Plaintiff, by its attorneys, hereby moves this Court to forthwith issue a temporary restraining order, without requiring the giving of notice thereof to the defendants or their attorneys, restraining and enjoining the defendants, their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from instituting, prosecuting or undertaking action in any State or United States Court effecting the property, instrument, or obligations involved in the within action pending a hear-

ing and determination of plaintiff's motion for preliminary injunction. Plaintiff further moves this Court for an order setting a date for such hearing.

2. Unless this motion is granted, plaintiff will suffer immediate and irreparable loss, damage or injury as a result of the actions of the defendants before defendants or their attorneys can be heard in opposition hereto, and before a hearing can be had on the motion for preliminary injunction, as more fully appears in the verified Complaint filed herein, and the certificate of the undersigned, attached hereto.

3. Said temporary restraining order can be issued ex parte pursuant to 28 U.S.C., §2361 and the provision of Rule 65(e) FRCP.

/s/ John C. Speer
Attorney for Plaintiff, First
Tennessee Bank N.A., Memphis

OF COUNSEL:

HEISKELL, DONELSON, ADAMS
WILLIAMS & KIRSCH
2020 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 525-8231

ATTORNEY'S CERTIFICATE IN SUPPORT OF
EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER
(Filed November 17, 1978)

We, Ben C. Adams and John C. Speer, are the attorneys for First Tennessee Bank N.A. Memphis, the plaintiff in the above entitled action. In support of plaintiff's ex parte

motion for a temporary restraining order, we hereby certify as follows:

Notice should not be required in the instant case inasmuch as it is imperative that this Court issue immediately a temporary restraining order in order that the defendants herein will be restrained from proceeding to satisfy the State Court judgments previously issued with respect to the matters contained in the Complaint. Furthermore, unless the defendants, Smith, et al, are hereby restrained they are likely to proceed to satisfy the money judgment entered by the Supreme Court of Arkansas against the plaintiff after which time the relief sought by the plaintiff herein could not be granted and plaintiff would suffer irreparable loss and damage. This damage would likely result before notice could be given to the defendants or their attorneys and prior to the time within which they could be heard in opposition.

/s/ John C. Speer
Attorney for Plaintiff, First
Tennessee Bank N.A., Memphis

OF COUNSEL:

HEISKELL, DONELSON, ADAMS
WILLIAMS & KIRSCH
2020 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 525-8231

MOTION TO RECONSIDER DENIAL OF TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT THEREOF
(Filed November 17, 1978)

Comes now the plaintiff and moves this Court as follows:

1. This Court on November 17, 1978, denied plaintiff's application for temporary restraining order and entered an order in support thereof.

2. Subsequently, the Probate Court of Crittenden County, Arkansas, entered an Order ordering and directing the plaintiff to appear in the Probate Court of Crittenden County, Arkansas on November 29, 1978, and further to distribute proceeds of the estate remaining in the hands of the plaintiff as executor. A copy of said Order is attached hereto as Exhibit "A".

3. Notice of said Order of Distribution and Hearing was not given to all beneficiaries of the estate, defendants herein. Further, said distribution of sums remaining in the hands of the plaintiff as executor would be prejudicial to all parties herein and would tend to affect the relief that could be awarded by this Court in the within action.

4. Attorney for the plaintiff certifies that he has contacted the attorneys for the defendant herein of his intention to apply to this Court for the reconsideration of this Court's previous Order and that the attorney for defendant, Sullivan, et al., has indicated that he does not wish to appear before the Court and the attorney for defendant, Smith, et al., could not be reached by the undersigned.

WHEREFORE, plaintiff moves this Court to issue a

temporary restraining order enjoining the defendants from proceeding to distribute the assets of the Lula S. Torian Estate pending a preliminary hearing by this Court scheduled for December 15, 1978.

HEISKELL, DONELSON, ADAMS,
WILLIAMS & KIRSCH
By: /s/ John C. Speer
Attorney for Plaintiff

2020 First Tennessee Building
Memphis, Tennessee 38103
(901) 525-8231

IN THE PROBATE COURT OF CRITTENDEN COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF
LULA S. TORIAN, DECEASED NO. 3556

(Filed November 20, 1978)

This Court, on November 22, 1976, having entered an Order Denying Specific Credits of Accounting in the sum of $229,114.34, with interest thereon at the rate of 6% per annum from November 22, 1976; and

Said Order having been appealed to the Supreme Court of Arkansas and affirmed by the Supreme Court of Arkansas on April 24, 1978, and the Supreme Court's Mandate having been filed in this Court on May 15, 1978; and

The Supreme Court of the United States of America, having denied Certiorari by Order dated October 2, 1978, and having denied a Petition for Rehearing by Order of

November 13, 1978; both of said instruments having been filed in this Court; and

First National Bank of Memphis (now First Tennessee Bank) as principal and Fidelity and Deposit Company of Maryland, as surety, have filed a Supersedeas Bond in this Court, guaranteeing the payment of said Judgment; and

There being no reason why distribution of the sums remaining in the executor's hands should not be distributed forthwith;

IT IS, BY THE COURT, CONSIDERED AND ORDERED:

1. That First National Bank of Memphis (now First Tennessee Bank) executor, be and it hereby is ordered and directed to appear in this Court at 9:30 a.m. on November 29, 1978, at the Courthouse in Marion, Arkansas, and distribute the sums remaining in its hands in accordance with law;

2. That unless distribution is made by the Executor at the aforesaid time and place in accordance with this Order, the Court will enter Judgment against Fidelity and Deposit Company of Maryland for the amount of the above described Judgment, together with interest and costs and will take such further action as it deems reasonable;

3. The Clerk of this Court is hereby directed to forthwith notify the said Executor and its surety of this Order by placing a copy of the same in the United States Mail, certified mail, return receipt requested.

DATED: November 20, 1978.

/s/ Henry Wilson, Probate Judge

ORDER ON MOTION TO RECONSIDER DENIAL OF TEMPORARY RESTRAINING ORDER
(Filed November 29, 1978)

On the afternoon of November 28, 1978, counsel for the plaintiff filed a motion to reconsider this Court's denial of a temporary restraining order on November 17, 1978. Shortly after the motion was filed, counsel appeared in Court and presented a copy of the motion in connection with an application that the Court grant the temporary restraining order which it heretofore denied.

There is attached to the motion an order of Henry Wilson, Probate Judge of Crittenden County, Arkansas, which was filed November 20, 1978. That order directs the plaintiff in this cause to appear in the Probate Court of Crittenden County, Arkansas, at 9:30 a.m. on November 29, 1978, to distribute the sums remaining in its hands as executor of the estate of Lula S. Torian, deceased.

Upon consideration of the motion to reconsider, with the attachment thereto, the remarks of counsel made in open Court in support of the motion to reconsider, and the record in the cause, this Court is of the opinion that the temporary restraining order should not be granted *ex parte*.

IT IS THEREFORE ORDERED that the motion to reconsider denial of temporary restraining order is hereby denied.

IT IS FURTHER ORDERED that the motion for a preliminary injunction and the pre-hearing conference heretofore set in this cause shall remain set as previously scheduled.

ENTER: This 29th of November, 1978.

/s/ Robert M. McRae, Jr., Judge
U. S. District Court

MOTION OF LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIEL, VIRGINIA SULLIVAN McDANIEL, AS CO-GUARDIAN OF FRANCES SULLIVAN RICE, AND MARY CHARLOTTE GIBSON, TO QUASH THE SUMMONS ISSUED AGAINST THEM AND TO DISMISS THE COMPLAINT
(Filed December 11, 1978)

Comes Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniel, Virginia Sullivan McDaniel, as Co-Guardian of Frances Sullivan Rice, and Mary Charlotte Gibson, and move the Court to quash the summons issued against them in this cause and to dismiss the complaint as provided by Rule 12 of the Federal Rules of Civil Procedure on the following grounds:

1. The complaint is filed either as a bill of interpleader or a bill in the nature of a bill of interpleader against residents of Mississippi and residents of Tennessee, all of whom are necessary and essential parties. No deposit of the alleged stake was made with the Clerk of this Court and no bond was filed. Therefore, the process was issued without any jurisdiction in this Court as provided by Title 28, §1335, United States Code.

2. That if this complaint is treated as a bill of inter-

pleader or bill in the nature of a bill of interpleader under Rule 22 of the Federal Rules of Civil Procedure, plaintiff cannot issue process against Mississippi residents who are necessary parties, and, therefore, cannot proceed as a Rule 222 interpleader or a bill in this nature of a bill of interpleader.

Furthermore, no diversity of citizenship exists between the plaintiff and these movants with the exception of Louise Crum Smith, who is a citizen of the State of Mississippi, and such diversity is a necessary ingredient of a Rule 22 complaint in the absence of a federal question.

That since diversity is not alleged and does not exist, the only basis for a Rule 22 complaint would be the existence of a federal question and the complaint wholly fails to allege any pending federal question between these parties. The complaint affirmatively shows that the only federal question which ever existed between movants and plaintiff has been finally settled and adjudicated by the Probate Court of Crittenden County, Arkansas, the Supreme Court of the State of Arkansas and the Supreme Court of the United States by denial of a writ of certiorari. These facts affirmatively appear in numerical paragraphs 14, 15, 16 and 17 of the complaint and in the exhibits attached to the complaint.

That the complaint, therefore, should be dismissed as to all of the movants for the reasons stated and should be dismissed as to the movant, Louise Crum Smith, for the additional reason that she was served with process outside the State of Tennessee and in the State of Mississippi where she is a resident and citizen.

3. The complaint shows on its face that there is neither

a fund nor property in the possession of plaintiff which is claimed by adverse interests, and even if such fund or property existed, the plaintiff has failed to either make the deposit of the alleged fund in dispute or file a bond, and, therefore, the complaint should be dismissed.

4. The controversy and issues alleged to exist between the movants and plaintiff have been finally adjudicated and settled as shown by the final decree of the Probate Court of Crittenden County, Arkansas, the opinion of the Supreme Court of Arkansas, which affirmed the Trial Court, both of which are exhibited to the complaint, and by the denial of a writ of certiorari by the Supreme Court of the United States.

5. The complaint on its face shows that the liability of plaintiff to movants has been merged in a final decree entered in the Probate Court of Crittenden County, Arkansas, which was affirmed by the Supreme Court of Arkansas, and certiorari was denied by the Supreme Court of the United States, and the liability of plaintiff to movants on this judgment cannot be the subject of a bill of interpleader or bill in the nature of a bill of interpleader. Such a complaint would constitute a collateral attack on a valid final decree of a court of competent jurisdiction.

6. The final decree entered in the Probate Court of Crittenden County, Arkansas, was entered pursuant to an accounting in the administration of the estate of Lula S. Torian and the Probate Court had exclusive jurisdiction in such a proceeding.

7. The complaint shows on its face that there are not multiple claims to a common fund in the hands of plaintiff and, therefore, there is no basis for either a bill of interpleader or bill in the nature of a bill of interpleader.

WHEREFORE, Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniel, Virginia Sullivan McDaniel as Co-Guardian of Frances Sullivan Rice, and Mary Charlotte Gibson, move the Court to quash the process issued against them and to dismiss the complaint, and the movant, Louise Crum Smith, moves the Court to quash the process on the additional ground that she is a resident and citizen of the State of Mississippi, and is not subject to the service of process in this cause for any reason.

RIEVES, RIEVES & SHELTON
By: /s/ Elton Rieves III

and

BURCH, PORTER & JOHNSON
By: /s/ John S. Porter
Attorneys for movants

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
(Filed December 13, 1978)

COME NOW Defendants, Dorothy Hope Sullivan, David Sullivan, and Warren Sullivan, in the above cause and move the Court to quash process, to dismiss the present action, or in the alternative to enter Summary Judgment herein for these Defendants, for the following reasons:

1. Process can only be validly issued and jurisdictionally effective as to these Defendants if issued pursuant to a valid statutory interpleader, meeting all of the jurisdictional requirements of 28 U.S.C. §1335.

2. The jurisdictional requirements of 28 U.S.C. §1335

have not been met in this case inasmuch as there is no res or fund or bond in lieu of fund, deposited into the Court as an incident of the interpleader proceeding, as required by the statute.

3. The above named Defendants make no claim to any fund held by Plaintiff and assert no claims against either Plaintiff or Co-Defendants, and consequently this is no "adverse claim" as required by the statute.

These Defendants therefore move the Court to quash the process herein, to dismiss the above proceeding as to them with prejudice, or in the alternative to treat this as a Motion for Summary Judgment dismissing the action as to these Defendants for lack of jurisdictional prerequisites.

Defendants submit herewith a Memorandum Brief in support of their position.

Respectfully submitted,

HOLCOMB, DUNBAR, CONNELL,
MERKEL, TOLLISON & KHAYAT
A Professional Association
Post Office Box 368
Clarksdale, Mississippi 38614

By: /s/ Jack F. Dunbar

/s/ David T. Lail

INTERPLEADER BOND
(Filed December 14, 1978)

We, the undersigned, First Tennessee Bank N.A. Memphis, plaintiff in interpleader, as principal, and The First

Tennessee National Corporation as surety, are held and firmly bound, pursuant to Title 28, United States Code, Section 1335, to J. Franklin Reid, Clerk of the United States District Court, Western District of Tennessee, Western Division, in the amount of $260,000.00, for which payment, well and truly to be made, we firmly bind ourselves jointly and severally.

The plaintiff has commenced an action in the nature of an interpleader in the above-entitled court, impleading the following claimants, who assert adverse title to assets in the amount of $256,909.36 currently charged to the plaintiff as executor:

Louise Crum Smith
Ralph Crum
James Crum
Bates Sullivan
C. H. Sullivan, Jr.
Louise Sullivan Jennings
Virginia Sullivan McDaniels
Frances Sullivan Rice
Mary Charlotte Gibson
Estate of H. D. Torian
Dorothy Hope Sullivan
Robert Lamb Sullivan
David Sullivan
Warren Sullivan

This obligation shall be and remain in force and effect until such time as plaintiff shall comply with the future order or judgment of the Court with respect to the subject in controversy in this action or upon further order of this Court, and upon such compliance this obligation shall be void.

DATED: December 14, 1978.

FIRST TENNESSEE BANK N.A. MEMPHIS
By: /s/ E. Kelton Morris, Principal

FIRST TENNESSEE NATIONAL CORP.
By: /s/ Robert I. Rogers, Surety,
Financial Vice President and Treasurer

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FIRST TENNESSEE BANK

V.

LOUISE CRUM SMITH, ET AL

CIVIL ACTION NO. C-78-2610

TESTIMONY OF
ROBERT P. BLUMENTHAL

December 28, 1978

ROBERT P. BLUMENTHAL, the said witness, having been duly sworn, testified as follows:

THE COURT: Let's don't ask where he went to school and all those things, I will take judicial notice that he works for the bank, and he is the one that has suffered all the agony. Do get his name on the record, but I really don't think we need to know where he went to high school and all of that sort of thing.

DIRECT EXAMINATION
BY MR. SPEER:

Q. State your name, please?

A. Robert Philip Blumenthal.

Q. What is your position with First Tennessee Bank?

A. I am the Estate Administration Manager.

Q. You swore to the complaint that was filed in this cause?

A. I did.

Q. You are familiar with the proceedings and particularly the amount of money in the estate?

A. I am.

Q. Will you tell us, if you have available to you there, the total amount of money that has been paid out by the bank out of the bank's own funds to Arkansas beneficiaries?

A. The total amount that was advanced by the bank under the order of the Arkansas Court was $256,909.36. That consisted of some $229,114.34 as being the amount originally declared by the Arkansas Court as the allowable amount. Interest totaled $27,795.02, which was the interest through the date of payment of November 29, 1978.

Q. Mr. Blumenthal, read those two figures out again a little more slowly. The interest was how much?

A. $27,795.02.

Q. And the judgment again was how much?

A. $229,114.34.

Q. And the two of those were the total paid out by the bank.

Was that total figure out of the bank funds, that amount was actually paid out from the bank's own assets?

A. Those were the bank's own assets.

THE COURT: All right, I would like for the record to reflect what is left in the estate, and if they are different.

Q. Mr. Blumenthal, are there an Arkansas and a Mississippi estate account, or is it all kept together?

A. There are two separate estate accounts.

Q. Give us, if you would, the total of the estate assets that remain in the hands of the bank that have not been distributed?

A. In the Arkansas estate there is cash remaining of $19,583.66.

In the Mississippi estate there is no cash remaining, but we are still liable under the proceedings in Mississippi relative to the real property.

Q. And that's nine hundred and twenty acres?

A. Approximately.

Q. And that would be all of the real property that is down there?

A. That's correct.

THE COURT: All right, I assume that there are no stocks and bonds or other things?

Q. Is there any personal property, stocks and bonds other than as evidenced by the cash, approximately nineteen thousand dollars remains in the Arkansas portion, is there anything in addition to that?

A. No, there is not. All individual holdings of securities were either distributed under prior court order, or paid in order to pay tax liabilities.

Q. Has there been any final accountings approved by either court?

A. No final accountings have either been made or approved by either court.

THE COURT: Does opposing attorneys wish to ask any questions?

MR. PORTER: One question.

THE COURT: All right.

CROSS-EXAMINATION
BY MR. PORTER:

Q. Mr. Blumenthal, the nineteen thousand odd dollars that you mentioned you still have in the Arkansas estate, was that withheld for a particular purpose?

A. It consists of a number of amounts that were approved as reserves by the Court, or allowable by the Court.

Q. Do you mind stating to the Court what items make up that amount?

A. Not at all.

Reserve for Arkansas state tax, which is the additional potential state tax under the State of Arkansas by reason of attorney and executor fees $2,239.03.

The additional — there was a reserve allowed for additional federal estate tax payable for the same reason $8,287.03.

There was, in addition, attorneys and executor's fees allowable, and as yet unpaid, of $9,000.00.

There was a reserve for closing costs of thirty dollars, and a reserve for the Arkansas fiduciary income tax of $27.40.

Q. Has a complete and final distribution been made of the Arkansas estate with the exception of those special amounts?

A. There has been a distribution, I don't know whether I would characterize it as final.

Q. Has any claim been made by the legatees, either the specific legatees or the residuary legatees, against the bank for any matter as to any funds that you have in hand and have any knowledge of?

A. There is a claim by the Arkansas attorneys for an additional two hundred dollars in court costs.

Q. That's the only claim you are aware of that is against any fund you have in hand?

A. At this time.

MR. PORTER: That's all.

MR. DUNBAR: May I have questions, too?

THE COURT: Certainly.

CROSS-EXAMINATION
BY MR. DUNBAR:

Q. I am sure you didn't say you are claiming this land in Mississippi is presently an asset of the estate, are you?

A. I said it continues to be subject to the Probate Court's

jurisdiction, and we continue to have responsibility for it.

Q. Well, you are familiar — well, the land has fallen through to the devisees in Mississippi to the extent it is really not an estate asset any more, isn't that correct?

A. I'm referring to the permanent basis. It is subject to Mississippi law to the payment of expenses as — and expenses allowed, fees and possible tax liability have not yet been adjudicated against the property, but could be.

Q. The notice to creditors as presented?

A. That's correct.

Q. And there are no probated claims against the estate?

A. There are no claims outstanding in Mississippi at this time that I know of.

Q. You don't know of any pending?

A. There would be the claim of the bank for compensation.

Q. I understand that, that's what you are trying to get to in this lawsuit?

A. No, I assume some day we will reach a conclusion as to the litigation, and when we do get to that point in time I assume we will return to Mississippi to render final accounting, seek the payment of fees on behalf of ourselves and our counsel, and final accountings.

Q. But there are no claims against the land to your knowledge, is that correct?

A. There is a potential claim of the Internal Revenue Ser-

vice by reason of our now having filed amended returns showing a reduction in the amount of fees so there will be a claim for additional state tax purposes, and possibly one for Mississippi Inheritance Tax purposes. And as I have been pointed out, we have been allowed a reserve in Arkansas for the tax due on Arkansas property, so I cannot categorically say there are no claims, either known or potential.

Q. The owners of the land at this present time, or previously, have at no time made any claim against the bank, that is pending?

A. I know of no claim.

MR. DUNBAR: That's all we have.

THE COURT: All right, thank you, sir.

(Witness excused)

I hereby certify that the foregoing 8 pages, to the best of my knowledge, skill and ability, are a true and correct transcript of my shorthand notes relating to the testimony of Robert P. Blumenthal in the case of:

First Tennessee Bank

V.

Louise Crum Smith, et al
Civil Action No. C-78-2610
This 16th day of January, 1979.

/s/ Brenda H. Pellicciotti
Official Court Reporter
United States District Court
Western District of Tennessee

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FIRST TENNESSEE BANK
V.
LOUISE C. SMITH, ET AL

CIVIL ACTION NO. C-78-2610

RULING OF THE COURT
December 15, 1978

THE COURT: The sort of whirl-wind approach that the Court has been subjected to in this phase of the law has caused the Court to learn a lot but maybe not enough about this topic.

I am persuaded that this dispute was a proper topic for an interpleader. I think that the parties are adverse claimants because the estate taxes were paid with assets that apparently would render the estate insolvent if they are not allowed in Arkansas. And the only way to do that would be to go against the land.

I regret that the bank didn't at some point much earlier say "Here are all the assets, I will pay them into some appropriate interpleader court or bond." And let the bank by agreement continue to administer the assets, or protect them so they earn money. But that wasn't done.

The most troublesome phase of this is whether or not the bank waited too late after they liquidated to assess in the respective states.

I am going to hold that the bank did not wait too late, and that this is an appropriate means of putting together

the adverse claims of who should bear the brunt of these taxes.

Now, unfortunately this brings to bear all the knotty problems that have been alluded to in these remarks this morning, the fact that the Arkansas beneficiaries went to Mississippi, and the fact that Mississippi has such an unusual procedure in my opinion — they ignored domicile.

Then we have the awkward problem of the Bank's conduct on the way they handled it, which may or may not be ultimately fatal to their position.

But I am prepared to hold that this is an interpleader dispute that the Defendants should respond to.

Now, in order to preserve what I believe I need to do with regard to this Court's jurisdiction, I am going to issue a Preliminary Injunction against the Judges who are named as Defendants preliminarily. I believe that can be done, although I don't believe we can issue a final injunction against them. And I will enjoin the parties from taking steps to close these estates.

I am not going to order anybody to pay any money. In the first place, I don't know who I would order to do it.

I don't know ultimately the position of which state will prevail, or how we will go about it, but I do believe that the Supreme Court of the United States in its rulings has indicated that interpleader is an appropriate vehicle where you have inconsistent judgments from the states. And I think the authorities also have recognized that in the area of estates that when there is an apparent inconsistency that it should be brought to the attention of an interpleader court.

Now I am not directing that this be done, but if the Court is wrong, and I am very much concerned about whether we waited too late with the bond and all the other things, this preliminary injunction or the issuance of it can be appealed at this time. Now, counsel might want to give some consideration to that because if the Court is in error about whether or not we should have the interpleader we ought to learn about it before you all start digging into all these things about who was in Mississippi and who didn't go to Arkansas, and that is a real law school exam situation.

I don't believe that the last judgment in time is that simple in this case. It may be. But the more I hear our good friends from Mississippi talk the more persuasive they are, and when the Arkansas lawyers are on their feet they are persuasive.

The thing that has persuaded me to go this route is that I have become persuaded that some court has to be available to resolve this matter.

As I say, I wouldn't have had any trouble if they had come in when the will was probated in Arkansas, or a number of stages in here where it would have been much better. But the Bank's lawsuit is no better or worse than the predicament they were in, and I don't think the issues of the Temporary Restraining Order had that much to do with it, because they were already on a supersedeas bond over there, and even if we postponed it, ultimately there was going to be a collection on it.

I will overrule the motion of the two sets of Defendants. Then if they want to appeal that they can do so.

I would like for Mr. Speer and his entourage there to prepare some necessary findings, he has been the one that

has spoken up more about it and I think it will be less trouble for him. I reserve the right to change it. But I would ask him to do that promptly. It should make reference to these things and show what is in the record.

I would like him to submit that, and send opposing counsel a copy, and I would like him to do that promptly next week and I will take a look at it.

I don't intend to have another hearing on it, but if counsel want to supplement the record or something like that I will consider it. I intend to try to get it signed and filed, and I urge you to give serious thought to appealing this. I could be entirely wrong about the interpleader. The bank has enough of its money in it that I am not too concerned about the bond.

We will have another hearing if there is another application for another type injunction, but I am not going to order anybody to pay any money, or restrain the use of the land.

MR. DUNBAR: May I ask —?

THE COURT: Yes.

MR. DUNBAR: So I will understand clearly what Your Honor has directed Mr. Speer to do, we are looking toward some sort of agreement for the evidence so that on the appeal the Appellate Court will have the same benefit of what we have had in Chambers and what Your Honor has said?

THE COURT: It should be confined to what is in the record.

You can refer to the figures that were testified to, but it should refer to exhibits to the pleadings and matters of

that sort. Then if it is wrong and if you get in the Appellate Court then in your tactful way you can say how ridiculous it was for the Judge to waste your findings. I don't want this to be an argument, I want this to be factual.

I hereby certify that the foregoing 7 pages, to the best of my knowledge, skill and ability, are a true and correct transcript of my shorthand notes pertaining to the Ruling of the Court in the hearing on the case of:

First Tennessee Bank

v.

Louise C. Smith, et al
Civil Action No. C-78-2610

This 16th day of January, 1979.

/s/ Brenda H. Pellicciotti
Official Court Reporter
United States District Court
Western District of Tennessee

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR PRELIMINARY INJUNCTION
(Filed January 17, 1979)

This cause came on to be heard on the application of First Tennessee Bank N.A., Memphis, Executor of the Estate of Lula S. Torian, for a preliminary injunction, pursuant to notice given to defendants by an order of the Court dated the 17th day of November, 1978.

Plaintiff appeared through its counsel of record.

Defendants Louise Crum Smith, Ralph Crum, James Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan

Jennings, Virginia Sullivan McDaniels, Guardian of Frances Sullivan Rice, and Mary Charlotte Gibson (hereinafter called defendants Smith) appeared through their counsel, John S. Porter of the Memphis, Tennessee, Bar, and Elton A. Rieves III and Frank Elcan of the Crittenden County, Arkansas, Bar; and defendants Dorothy Hope Sullivan, David Sullivan, and Warren Sullivan (hereinafter called defendants Sullivan) appeared through their counsel, Ed Connell and Jack F. Dunbar of the Quitman County, Mississippi, Bar.

Prior to the hearing the defendants through their counsel had filed motions to quash service of process based upon the contention that the Court did not have jurisdiction of the defendants, and upon the further motions of the defendants to dismiss on the ground that the Complaint failed to state a cause of action upon which relief could be granted.

The Court advised counsel that it would consider the motions of the defendants solely on the questions having to do with the jurisdiction of the Court under the interpleader statute, and would not rule upon the further grounds of the motions to dismiss.

Plaintiff brought this action against the defendants Smith and the defendants Sullivan as beneficiaries of the Estate of Lula S. Torian, and the defendants Hon. Henry Wilson, Probate Judge of Crittenden County, Arkansas, in whose court the Arkansas probate proceeding of the Lula S. Torian Estate is presently pending, and Hon. Leon Hannaford, the Chancellor of the Chancery Court of DeSoto County, Mississippi, in whose court the Mississippi probate proceeding of the Torian Estate is presently pending. The

action is brought under the Federal Interpleader Act, 28 U.S.C. §1331, §1397, and §2361. Complaint, paragraphs 1-5.

Plaintiff, First Tennessee, is, and at all times mentioned herein was, Executor of the Estate of Lula S. Torian in the States of Mississippi and Arkansas. Mrs. Torian died testate, legally domiciled in West Memphis, Arkansas, but owning approximately 920 acres of real property in DeSoto County, Mississippi. Complaint, ¶7.

The plaintiff offered the will for probate in the State of Mississippi, where it was determined that Mississippi was the proper state for the administration of the estate in spite of the domicile of the decedent being Arkansas. The courts of Mississippi and the law of that state directed the executor to pay the estate taxes on the land in Mississippi from the residuary estate. Exhibit "A" to Complaint.

Subsequently, in an action joined by the executor and all beneficiaries of the estate (Sullivan and Smith), an attempt was made to withdraw the original will from Mississippi in favor of the state of domicile. The Chancery Court denied the application, and the Supreme Court of Mississippi affirmed. Exhibit "B" to Complaint.

Pursuant to said directive the estate taxes were paid from the residuary estate.

The plaintiff also opened the estate in Arkansas and in that proceeding it undertook to take a credit in its accounting for the payment of the estate taxes from the residuary estate. Upon the objection of the defendants Smith, the Probate Court of Crittenden County, Arkansas, denied the credit for the portion of the estate taxes which applied to the Mississippi land because the Arkansas law

directs that the estate taxes on land *not* be paid out of the residuary estate. Exhibit "C" to Complaint.

A supersedeas bond was posted by the plaintiff for the amount of the disallowed credit, and an appeal was taken to the Supreme Court of Arkansas. That court affirmed the ruling of the Probate Court. Exhibit "D" to Complaint. Certiorari was sought in the Supreme Court of the United States upon a full faith and credit contention. The petition for certiorari was denied. Exhibit "E" to Complaint.

This suit was filed, and this Court denied *ex parte* temporary restraining order. Subsequently, the Probate Court in Arkansas ordered the plaintiff to appear and further distribute the proceeds of the estate or have the supersedeas bond forfeited. Thereupon the plaintiff with its own funds made the distribution of the disallowed credit, which exceeded the funds on hand in the estate.

At the hearing in this Court and at the request of the Court, Robert Blumenthal, Trust Officer of plaintiff, who was in charge of the administration of the Estate of Lula S. Torian being administered in the State of Mississippi and was also in charge of the administration of the Estate of Lula S. Torian being administered in the State of Arkansas, testified that the personal estate in the State of Mississippi was exhausted, but that said estate was still open and that no fees had been allowed either to plaintiff or counsel for plaintiff in the Mississippi administration, and that no final settlement had been filed; said witness testified further that plaintiff retained as executor in the administration in the State of Arkansas the sum of $19,583.66, which was retained as an executor's fee allowed by that court in the amount of $4,000.00 and attorney's fee allowed by that court to attorneys for the executor in the amount of $5,000.00, additional

Arkansas Estate Tax due in the amount of $2,239.23, additional Federal Estate Tax due in the amount of $8,287.03, estimated closing court costs in the amount of $30.00, and an amount to cover Arkansas Fiduciary income tax in the amount of $27.40.

From the testimony of Robert P. Blumenthal, Trust Officer of plaintiff, the Court finds that both estates in the State of Mississippi and in the State of Arkansas remain open and have not been finally closed.

This Court concludes that the two groups of defendants have adverse claims to the assets of the Estate of Lula S. Torian, as that term is used in the interpleader statute, as evidenced by conflicting state court judgments of Arkansas and Mississippi as to whether the interests of Mississippi defendants Sullivan should be charged with payment of a pro rata part of federal estate and inheritance taxes that have been paid out of the residuary estate by the executor.

The Court further concludes that the two defendant-claimant groups are of sufficiently diverse citizenship to satisfy the requirements of 28 U.S.C. §1335.

The Court therefore concludes that this is a proper case for a bill in the nature of a bill of interpleader under §1335 of Title 28, U.S. Code, the plaintiff having filed a bond in the amount of $260,000.00 in this cause with plaintiff as principal and the holding company which owns plaintiff as surety.

The Court further concludes that the defendants Sullivan and the defendants Smith should be enjoined from instituting or prosecuting any suit, including probate proceedings regarding the Estate of Lula S. Torian, in any state or United States Court except this Court and in this pro-

ceeding; and that the defendants the Hon. Henry Wilson and the Hon. Leon Hannaford should be enjoined from entering any further Orders in the Estate of Lula S. Torian, deceased.

The Court at the hearing was only concerned with that portion of the motions filed by defendants which raise jurisdictional questions, and the Court is of the opinion that the other grounds of the motions filed should not be ruled upon at this time.

All of which was incorporated in the Court's Order filed on December 27, 1978, and entered on the docket sheet on December 28, 1978.

ENTER: This 17th day of January, 1979.

/s/ Robert M. McRae, Jr., Judge
United States District Court

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 1-17-79.

ORDER GRANTING PRELIMINARY INJUNCTION AND DENYING MOTIONS TO DISMISS
(Filed December 27, 1978)

This matter was heard on December 15, 1978, upon plaintiff's Motion for Preliminary Injunction and defendants' Motions to Dismiss, Quash Service of Process and/or Summary Judgment. The Court made oral findings and conclusions at the end of the hearing. For the reasons included in the oral ruling the Court concluded that the present action is properly brought under the federal interpleader statute, 28 U.S.C. §1335, and a Preliminary Injunction should issue and that the motions of the defen-

dants which challenge the jurisdiction of this Court under the interpleader statute should be denied.

IT IS THEREFORE ORDERED that:

1. Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Sullivan Rice, Mary Charlotte Gibson and Estate of H. D. Torian; Dorothy Hope Sullivan, Robert Lamb Sullivan, David Sullivan, and Warren Sullivan, their respective agents, attorneys, representatives, and all persons claiming through or under them are enjoined until further Order of this Court from instituting or prosecuting any suit, including probate proceedings regarding the Estate of Lula S. Torian, in any state court or United States court except in this Court and in this proceeding;

2. The defendants, the Honorable Henry Wilson, Probate Judge of Crittenden County, Arkansas, and the Honorable Leon Hannaford, Chancellor of the Chancery Court of DeSoto County, Mississippi, or any person acting on their behalf, are enjoined until further Order of this Court from proceeding to close or affect the Estate of Lula S. Torian or its assets;

3. The motions of defendants Smith, et al and Sullivan, et al to quash service of process, to dismiss the Complaint, or for summary judgment are overruled and denied to the extent that they challenge the jurisdiction of this Court under the interpleader statute, 28 U.S.C. §1335;

4. Although this Court is of the opinion that this Order Granting Preliminary Injunction is appealable pursuant to 28 U.S.C. §1292(a)(1), if the Court is in error, the Court is of the opinion that this Order involves a controlling

question of law as to which there is a substantial ground for difference of opinion, namely the jurisdiction of this Court to proceed under the interpleader statute in the light of the facts and circumstances of this case. The Court is of the further opinion that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

ENTER: This 27th day of December, 1978.

/s/ Robert M. McRae, Jr., Judge
United States District Court

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 12-28-78.

Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1501 and 80-1528

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

Dorothy Hope Sullivan, David Sullivan, and Warren Sullivan; Louise Crum Smith, Ralph Crum, James Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Rice, Through Her Co-Guardians, F. Bates Sullivan and Virginia Sullivan McDaniels, and Charlotte Gibson,

Petitioners,

Vs.

First Tennessee Bank N.A. Memphis, Executor Of Estate Of Lula S. Torian,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONSOLIDATED BRIEF OF RESPONDENT FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN

Ben C. Adams
Frierson M. Graves, Jr. (OF RECORD)
John C. Speer (OF RECORD)
Stephen C. Morton
HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & KIRSCH,
A Professional Corporation
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 525-8231

Counsel For Respondent

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Nos. 80-1501 and 80-1528

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Supreme Court of the United States

OCTOBER TERM 1980

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A Professional Corporation
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 525-8231

Counsel For Respondent

QUESTION PRESENTED

Whether the Court should grant a writ of certiorari to consider whether the lower courts were correct in denying Petitioners' Motions to Dismiss Respondent's Complaint and in finding that Respondent First Tennessee Bank N.A. Memphis, executor of the estate of Lula S. Torian, had satisfied the requirements of the Federal Interpleader Act set forth in 28 U.S.C. §1335.

PARTIES TO THE PROCEEDING

In addition to the parties captioned on the cover page, the Honorable Leon Hannaford, Judge of the DeSoto County, Mississippi, Chancery Court and the Honorable Henry Wilson, Judge of the Probate Court of Crittenden County, Arkansas, are parties to the trial proceedings, but have neither appeared therein nor appealed. Robert Lamb Sullivan, whose interests are parallel to the interests of Dorothy Hope Sullivan, David Sullivan, and Warren Sullivan (petitioners in Number 80-1501), has not been served with process.

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit are unreported and begin on pages B-73 and A-1, respectively, of the Appendix to the Petition of Dorothy Hope Sullivan, *et al* (No. 80-1501).*

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* "Appendix" hereafter refers to the appendix to the Petition of Dorothy Hope Sullivan et al, which contains all documents that will be referred to in this Brief.

JURISDICTION OF THE COURT

Petitioners seek review by the Court pursuant to 28 U.S.C. §1254(1). Both petitions were filed in the Court within ninety (90) days after the entry of the latest order denying any of Pettioners' petitions for rehearing in the Court of Appeals in accordance with 28 U.S.C. §2101(c) and Supreme Court Rule 20.4.

STATEMENT OF THE CASE

Petitioners Dorothy Hope Sullivan, David Sullivan and Warren Sullivan will be herein referred to as the "Mississippi beneficiaries," not only because they reside in Mississippi, but also because they prevailed in the Mississippi courts. The remaining Petitioners prevailed in the Arkansas courts and are designated hereinafter as the "Arkansas beneficiaries;" one is a resident of DeSoto County, Mississippi and the others are residents of Tennessee. First Tennessee Bank N.A. Memphis (the "Bank") is the executor of the estate of Lula S. Torian, deceased (the "Estate") in both Mississippi and Arkansas.

At the time the Bank filed this interpleader suit there was in existence an order of the Supreme Court holding that the Bank must follow Mississippi law in paying estate taxes which required the Bank, as Executor, to pay Federal Estate Taxes from the personalty of the Torian Estate which had been devised to Louise Crum Smith, et al, the Arkansas beneficiaries. This relieved the devisees of the Mississippi real estate (Dorothy Hope Sullivan, et al, the Mississippi beneficiaries) from any obligations in connection with the Federal Estate Taxes. Also in existence was an order of the Arkansas Probate Court affirmed by the Arkansas Supreme Court which denied the Bank, as execu-

tor, full credit for payment of the Federal Estate Taxes paid pursuant to the Mississippi decree. The total credit disallowed, including interest, amounted to $256,909.36.

The Arkansas beneficiaries demanded that the Bank distribute the money which had been disallowed as credits by the Arkansas courts as part of the Federal Estate Taxes attributable to the value of the Missssippi land. The Mississippi beneficiaries relied on the orders of the Mississippi courts which relieved them of payment of *these same taxes.* Thus, the Bank, as executor, was faced with complying with two inconsistent decrees reaching opposite conclusions. It was impossible for the Bank to comply with both decrees with the assets of the estate.

Of course, at this stage, all parties except the Bank were completely satisfied. However, the District Court found that the action taken by the Probate Court in Arkansas after this suit was filed requiring the money to be paid in by the Bank under the Supersedeas Bond had no effect on the facts existing at the time the suit was filed and then held that the Complaint would be treated as one in the nature of a Bill of Interpleader. The bref of neither Petitioner calls this to the attention of this Court. Unfortunately, neither brief pays any attention to the finding of the District Court, and both briefs incorrectly assume a state of facts which came about after the suit was filed and after the money was paid by the Bank into the Arkansas Probate Court and distributed.

In addition, Petitioners also ignore the fact that this was a "Complaint in the Nature of an Interpleader" rather than a pure interpleader suit.

The Torian Estate

Mrs. Lula S. Torian died testate, residing in West Memphis, Arkansas, but owning approximately 920 acres of real property in DeSoto County, Mississippi. Appendix at B-79. Thus, it was necessary to institute probate proceedings in both Mississippi and Arkansas. Under the will of Lula S. Torian (the "Will") the land was devised to the Mississippi beneficiaries. The residuary estate and a specific bequest of stock, of a total value of $636,977.58, was bequeathed to the Arkansas beneficiaries. Appendix at B-19 and B-34. The bulk of the personal assets of the Estate were located in a lockbox at the Bank in Memphis, Tennessee. At her death, the only real property Mrs. Torian owned in Arkansas was an interest in the home in which she and Mr. Torian resided. The Torians owned the property as tenants by the entirety and it passed to Mr. Torian by operation of law. Mrs. Torian owned no personal property located in Arkansas except some personal effects and household furnishings valued at less than $3,000.00. Appendix at B-22.

Thus, it was necessary to institute probate proceedings in both Arkansas and Mississippi.

Mississippi and Arkansas Probate Proceedings

On November 3, 1972, an Order was entered upon the Bank's Petition by the Chancery Court of DeSoto County, Mississippi, admitting the Will and Codicils of Lula S. Torian to probate and appointing the Bank as executor without bond. On January 23, 1973, on the Bank's Petition, authenticated copies of the Will and Codicils thereto were admitted to probate in the Probate Court of Crittenden County, Arkansas, and the Bank was appointed Executor. Appendix at B-33.

The Mississippi Litigation

After the Bank was appointed executor in both states, the Mississippi beneficiaries sought a determination by the Mississippi court of whether Arkansas or Mississippi law would apply to allocate the death tax burden among the beneficiaries.

Mississippi law requires, absent a contrary provision in the decedent's will, that the personal estate bear the burden of taxation and that real propery shall be taxed only to the extent that the personal estate is unable to bear the tax burden. Appendix at B-27 and B-28. Arkansas law provides that such taxation shall be apportioned among all of the beneficiaries according to the value of assets received. Appendix at B-42.

After a full hearing in which the Arkansas beneficiaries fully participated, the Mississippi court held that the decedent's Will should be construed to require the payment of all estate taxes pursuant to Mississippi law. Appendix at B-16 and B-42.

The Arkansas beneficiaries appealed the decision to the Mississippi Supreme Court alleging that the lower court should have applied Arkansas law to resolve the issue of who should bear the tax burden. On November 3, 1975, the Mississippi Supreme Court affirmed the lower court's finding. As a result, the Arkansas beneficiaries at that point were required to bear the burden of all estate taxes and expenses. Appendix at B-42 and B-43.

The Bank thereafter completed payment of the federal estate tax liability. Appendix at B-37.

The Arkansas Litigation

Subsequent to the Mississippi proceedings, the Bank filed its accounting in Crittenden County, Arkansas showing that it had received personal property with a total value of $636,977.58. Credits were claimed by the Bank against these estate assets for the amounts that it had paid for federal, Mississippi and Arkansas estate and inheritance taxes following the decision of the Supreme Court of Mississippi. The Arkansas beneficiaries objected to the accounting, asserting that the residuary estate had been wrongfully charged in the sum of approximately $228,000.00 because the Executor had not apportioned the taxes pursuant to Arkansas law. Appendix at B-34 and B-43.

The Bank asserted that the decision of the Supreme Court of Mississippi, which had in personam jurisdiction of all the Arkansas beneficiaries (one of whom was a resident of DeSoto County, Mississippi), was entitled to full faith and credit, and that the question of which beneficiaries should pay the estate taxes was res judicata. The Mississippi beneficiaries in their Petition, Page vii, erroneously state that the Arkansas beneficiaries were all Tennessee residents. The Arkansas Probate Court held that the Mississippi decree was entitled to full faith and credit only insofar as it affected "Mississippi" property, which it held did not include the substantial personal property of the Estate held by the Bank in Memphis. Accordingly, the Probate Court of Crittenden County, Arkansas denied the Bank's specific credits contained in the account totaling $229,114.34. This sum represented the portion of the estate taxes which under Arkansas law would be assessed against that part of the Estate devised to the

Mississippi beneficiaries. Appendix at B-31, B-32 and B-33.

The Bank appealed from the judgment of the Probate Court of Crittenden County, Arkansas. The judgment was affirmed by the Supreme Court of Arkansas on April 24, 1978. The Supreme Court of the United States denied the Bank's Petition for Writ of Certiorari to the Supreme Court of Arkansas on October 2, 1978, Appendix at B-39 and B-52, and denied the Bank's Petition for Rehearing on November 13, 1978. Appendix at B-57 and B-58.

Proceedings Under the Federal Interpleader Act

On November 17, 1978, four days after the Supreme Court of the United States denied the Petition for Rehearing, the Bank filed this action in the Nature of Interpleader along with an Ex Parte Motion for Temporary Restraining Order in the United States District Court for the Western District of Tennessee, Western Division, requesting that all parties (including the two courts which previously had entered orders relative to the Estate) be enjoined from undertaking further state or federal court proceedings which might affect the Estate property. Appendix B-53. The District Court denied the Bank's application for the temporary restraining order on November 17, and on November 28, 1978, denied the Bank's Motion to Reconsider. Appendix at B-56 and B-59.

On November 29, 1978, the Bank appeared before the Probate Court of Crittenden County, Arkansas, upon order by that court and was required to pay the Arkansas beneficiaries $229,114.34 plus interest of $27,795.02 pursuant to order of that Court. Appendix at B-57, B-58 and B-59. Because of the failure of the District Court to grant the

temporary restraining order the Bank had to make the ordered payment. This payment was made with the Bank's *own funds* because the Estate did not have sufficient assets. Appendix at B-68 *et seq.*

The Mississippi and Arkansas beneficiaries filed Motions to Dismiss and Motions to Quash Process in the interpleader action. The District Court considered the various Motions upon oral argument of counsel on December 15, 1978. Appendix at B-73. On December 27, 1978, the District Court entered its Order Granting Preliminary Injunction and Denying Motions to Dismiss from which this appeal is taken. Appendix at B-82 *et seq.* The District Court found that both probate estates remain open and have not been finally closed. Appendix at B-81 . The trial court also found that the claims of the Arkansas and Mississippi beneficiaries were adverse because the Arkansas courts would not allow credit for the estate taxes which the Bank had charged to the various beneficiaries in accordance with the Mississippi decree. The District Court noted that the United States Supreme Court has declared that interpleader is an appropriate vehicle for protecting the plaintiff from inconsistent state court judgments and indicated that some court should be available to resolve the treat of multiple liability faced by the Bank. The District Court also held that its refusal to grant a temporary restraining order to the Bank before it was required to pay its own funds to Arkansas beneficiaries did not deprive the Court of interpleader jurisdiction. Appendix at B-73 - B-75.

On appeal to the United States Court of Appeals for the Sixth Circuit, the trial court decision was affirmed. The Court of Appeals ruled (a) that the findings of the

District Court that there is a stake and adverse claims thereto were not clearly erroneous and (b) that the District Court did not abuse its discretion in entering a preliminary injunction.

SUMMARY OF ARGUMENT

A writ of certiorari should not be granted for numerous reasons. The facts in this complex case satisfying each jurisdictional requirement of the Federal Interpleader Act have been presented to and carefully considered by the courts below. The lower courts' decisions in this case are in accord with the only other recent decision addressing whether the Federal Interpleader Act is an appropriate vehicle for resolving various states' regulation or taxation of a decedent's estate. Four Justices of this Court indicated in concurring opinions in *California v. Texas*, 437 U.S. 601 (1978), that interpleader can provide relief from various states' inconsistent claims with respect to a decedent's domicile. In *Texas v. Florida*, 306 U.S. 398 (1939) (although Justice Stewart concluded the court was in error on the jurisdictional point), a case involving this Court's original jurisdiction, the Court has suggested that an interpleader action is appropriate. To the extent that the Petitioners claim that the Respondent waited too late to file this action, this Court has sustained interpleader jurisdiction when adverse claims previously had been reduced to final state court judgments in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

Reversal would create the incongruous result that the Respondent, executor of the Estate of Lula S. Torian, would pay approximately $256,000.00 of Federal Estate Taxes and interest from its *own* funds. Material omissions or

misstatements of facts in both petitions submitted to this Court hinder proper review.

ARGUMENT

I. THE LOWER COURTS GAVE FULL CONSIDERATION TO ALL OF PETITIONERS' ARGUMENTS, AND SUBSTANTIAL EVIDENCE SUPPORTS THEIR DECISIONS.

Both the Court of Appeals and the District Court carefully considered each of the points raised by the Petitioners concerning the jurisdictional requirements of 28 U.S.C. §1335. Substantial evidence in the record supports the findings that jurisdiction under the Federal Interpleader Act exists. To dispel the questions raised by Petitioners, a brief summary of how the jurisdictional requisites challenged in this Court were met follows.

Existence of a Stake. Petitioners urge that the Bank no longer holds a stake because the Bank was ordered by the Probate Court of Arkansas (*after* this interpleader action was filed) to pay the Arkansas beneficiaries more than $256,000.00. An executor's right of charge back under both Arkansas and Mississippi statutes was demonstrated in the Court of Appeals. Also, it was established that both the Arkansas and Mississippi estates remain open for adjustment of accounts. Petitioners argue that the decisions of the Supreme Courts of Arkansas and Mississippi render such a charge back impossible. It is because of these inconsistent judgments requiring the Executor to pay estate taxes from its funds, rather than from the estate, that the Bank seeks the protection accorded it under the Federal Interpleader Act. The decision of this Court

in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939), indicates that a federal court exercising interpleader jurisdiction can issue orders in derogation of final state court judgments. Other appellate decisions cited to the Court of Appeals indicate that the Bank need not have complete custody or possession of estate assets in dispute. Aside from the conflicting judgments of the Supreme Courts of Arkansas and Mississippi entered herein, the Bank retains, under both Arkansas and Mississippi law, authority as executor to charge the accounts of all beneficiaries. Therefore, the executor still has very real control over the assets of the estate of Lula S. Torian. All Petitioners ignore the fact that the Bank has control of the Mississippi land as an asset of the Estate. Additionally, the Bank has posted a bond in the district court to abide the outcome of this action in the amount of $260,000.00.

If the Mississippi Courts were correct, the entire liability for payment of Federal Estate Taxes was an obligation of the personal estate which was left to the Arkansas beneficiaries. If the Arkansas Courts were correct, the Mississippi lands could be used for payment of the portion of the Federal Estate Tax attributed thereto and the Mississippi devisees of the land would bear the burden for payment of that portion of such taxes.

Adversity of Claims. Petitioners argue that the claims of the Arkansas and Mississippi beneficiaries are not adverse because each has no further claims against the Estate. When interpleader jurisdiction is sustained, one of the sets of beneficiaries will be charged with additional estate taxes while the other will not. Their positions clearly will be adverse as they attempt to avoid paying these taxes, which under Arkansas law are payable by the Mis-

sissippi beneficiaries and under Mississippi law are payable by the Arkansas beneficiaries.

Arguments That a Particular State Judgment Prevails.

The Arkansas beneficiaries argue that the decision of the Supreme Court of Arkansas, as the last decision in time, controls. That statement may prove true at the "second stage" of interpleader, but is irrelevant in considering whether or not the jurisdictional requirements of the Federal Interpleader Act have been satisfied by the Bank. Assertion of this position before the Court underscores the adversity of Petitioners' claims.

Federal Adjudication of Probate Matters. The Arkansas Petitioners also argue that the federal courts should not involve themselves in matters subject to Probate Court jurisdiction. The cases cited in the Arkansas beneficiaries' Brief deal only with federal diversity cases, and not interpleader cases in which the jurisdictional considerations are vastly different. No reason is given why this Court should create such an exception to the scope of interpleader relief. Four Justices of this Court in concurring opinions in *California v. Texas*, 437 U.S. 601 (1978) indicate that interpleader can in fact provide relief in probate matters regarding conflicts between states as to a decedent's domicile. In *Texas v. Florida*, 306 U.S. 398 (1939), the Court implicitly recognized the utility of interpleader in a similar situation in a case involving a controversy between states.

11. THE LOWER COURTS' DECISIONS PREVENTED THE INEQUITABLE REQUIREMENT THAT THE BANK PAY A LARGE PORTION OF THE STATE TAXES FROM THE BANK'S OWN FUNDS

Both petitions take issue with District Court Judge McRae's statement that some court has to be available to resolve the obvious dilemma in which the Bank found itself after the Supreme Court of Arkansas in effect required the Bank to pay the Arkansas beneficiaries $256,000.00 of the Bank's own funds. Appendix at B-75. The Bank has met the equitable prerequisite of interpleader — being subjected to mutually exclusive claims to a single fund, now represented by the right of charge back against real property situated in Mississippi (the Arkansas beneficiaries now hold the Bank's own funds). The equitable nature of interpleader is succinctly described in 3A *Moore's Federal Practice*, ¶22.02[1] at 3005:

> Because of its undoubted utility, interpleader provisions have been held in countless federal decisions to be remedial and thus properly to be liberally construed so as to best effectuate their purposes.

The Bank, as executor, has acted in good faith, honestly, and has but one fund that it can charge for the estate taxes. The denial of the Petitioners' Motions to Dismiss was consistent with the law applicable to Motions to Dismiss and suits of interpleader.

III. THE NATURE OF THIS CASE DOES NOT JUSTIFY SUPREME COURT REVIEW

The fact situation in this case is extremely peculiar: the executor is unable to finally charge any beneficiary with a portion of the federal Estate Taxes due to the inconsistent decrees of Arkansas and Mississippi courts concerning the allocation of the taxes between devisees of land and legatees of personalty. The issues put to the Court for review are factual in nature: whether there is a "stake" and whether the Bank waited too late to file its interpleader, thereby prejudicing the Petitioners. While the answers to these questions are of great importance to the parties, they neither raise any important legal questions nor underscore a conflict among the courts of this nation.

The central issues in this case are controlled by facts occurring since 1972, by consistent lines of decisions and by state probate statutes, as has been pointed out above. The Petitioners present no authorities on interpleader to the Court that raise any issues not already considered by the courts below. Therefore, none of the issues raised by the Petitioners merit review by this Court.

CONCLUSION

The Arkansas and Mississippi beneficiaries oppose this interpleader action because, if it is not allowed, the estate assets now held by them pending the outcome of this action may be retained by them. More than $256,000.00 (plus interest) conditionally held by the Arkansas beneficiaries, pending final settlement of the estate, is in fact money of Respondent First Tennessee Bank. The lower courts have carefully considered all the jurisdictional arguments presented by Petitioners, and there is substantial evidence

to support their decisions. This case conforms with existing decisions and does not warrant the further review by this Court. Therefore, the Bank respectfully requests that the petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter be denied.

Respectfully submitted,
BEN C. ADAMS
FRIERSON M. GRAVES, JR.
JOHN C. SPEER
STEPHEN C. MORTON
HEISKELL, DONELSON, BEARMAN,
ADAMS, WILLIAMS & KIRSCH,
A Professional Corporation
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 525-8231
Counsel for Respondent

CERTIFICATE OF SERVICE

I, John C. Speer, certify that copies of the foregoing Brief on behalf of respondent First Tennessee Bank N.A. Memphis were mailed to Edward P. Connell and Jack F. Dunbar, P.O. Box 368, Clarksdale, Mississippi, 38614, attorneys for Petitioners Dorothy Hope Sullivan, *et al* (herein referred to as the Mississippi beneficiaries), and John S. Porter, 130 N. Court Street, Memphis, Tennessee, 38103 and Elton A. Rieves III, 200 Shoppingway, West Memphis, Arkansas, 72301, attorneys for Petitioners Louise Crum Smith, *et al* (herein referred to as the Arkansas beneficiaries) this 27th day of April, 1981.

/s/ John C. Speer